Defending Liberty
Pursuing Justice

EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Georgia Death Penalty Assessment Report

An Analysis of Georgia's Death Penalty Laws, Procedures, and Practices

"A system that takes life must first give justice."
John J. Curtin, Jr., Former ABA President

January 2006

AMERICAN BAR ASSOCIATION

Defending Liberty
Pursuing Justice

EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Georgia Death Penalty Assessment Report

An Analysis of Georgia's Death Penalty Laws, Procedures, and Practices

"A system that takes life must first give justice."
John J. Curtin, Jr., Former ABA President

January 2006

AMERICAN BAR ASSOCIATION

The materials contained herein represent the assessment solely of the ABA Death Penalty Moratorium Implementation Project and the Georgia Death Penalty Assessment Team and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and accordingly, should not be construed as representing the policy of the American Bar Association.

These materials and any forms or agreements herein are intended for educational and informational purposes only.

This document has been produced with the financial assistance of the European Union. The contents of this report are the sole responsibility of the American Bar Association and can under no circumstances be regarded as reflecting the position of the European Union.

Significant portions of the research was performed on Westlaw courtesy of West Group.

Copyright 2006, American Bar Association

ACKNOWLEDGEMENTS

The American Bar Association Death Penalty Moratorium Implementation Project (the Project) is pleased to present this publication, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report*.

The Project expresses its great appreciation to all those who helped to develop, draft, and produce the Georgia Assessment Report. The efforts of the Project and the Georgia Death Penalty Assessment Team were aided by many lawyers, academics, judges, and others who presented ideas, shared information, and assisted in the examination of Georgia's capital punishment system.

The entire staff of the Project along with its Steering Committee and Advisory Board participated in this endeavor and the Georgia Death Penalty Assessment Report could not have been completed without their cumulative efforts. Particular thanks must be given to Lindsay B. Glauner and Seth Miller, the Project staff who spent countless hours researching, writing, editing, and compiling this report. In addition, we would like to thank the American Bar Association Section of Individual Rights and Responsibilities for their substantive, administrative, and financial contributions.

We would like to recognize the research contributions made by Heather Schafer, Research Coordinator, Stewart Bratcher, Julia Blake Eno, Ryan Finch, J. Colby Jones, Heather S. Robinson, DeLaycee Rowland, Samir Patel, and Sarah Simmons, all of whom are law students at Georgia State University School of Law, Jimmy C. Luke, a student at Emory University School of Law, and Angela Tarabadka, a student at Mercer University School of Law.

Additionally, the efforts of Raymond Paternoster, Glenn Pierce, and Michael Radelet in conducting the attached race study were critically important.

Lastly, in this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Georgia death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

TABLE OF CONTENTS

EXECUTIVE SUMMARY ..... **i**

INTRODUCTION **1**

CHAPTER ONE: AN OVERVIEW OF GEORGIA'S DEATH PENALTY SYSTEM **7**

I. DEMOGRAPHICS OF GEORGIA'S DEATH ROW 7
II. THE STATUTORY EVOLUTION OF GEORGIA'S DEATH PENALTY SCHEME 9
III. THE PROGRESSION OF A GEORGIA DEATH PENALTY CASE FROM ARREST TO EXECUTION 18

CHAPTER TWO: COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE **49**

INTRODUCTION TO THE ISSUE 49
I. FACTUAL DISCUSSION 51
II. ANALYSIS 61

CHAPTER THREE: LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS **67**

INTRODUCTION TO THE ISSUE 67
I. FACTUAL DISCUSSION 69
II. ANALYSIS 79

CHAPTER FOUR: CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES **91**

INTRODUCTION TO THE ISSUE 91
I. FACTUAL DISCUSSION 92
II. ANALYSIS 104

CHAPTER FIVE: PROSECUTORIAL PROFESSIONALISM **109**

INTRODUCTION TO THE ISSUE 109
I. FACTUAL DISCUSSION 111
II. ANALYSIS 122

CHAPTER SIX: DEFENSE SERVICES **131**

INTRODUCTION TO THE ISSUE 131
I. FACTUAL DISCUSSION 133
II. ANALYSIS 151

CHAPTER SEVEN: THE DIRECT APPEAL PROCESS **169**

INTRODUCTION TO THE ISSUE 169
I. FACTUAL DISCUSSION 171
II. ANALYSIS 176

CHAPTER EIGHT: STATE POST-CONVICTION PROCEEDINGS **179**

INTRODUCTION TO THE ISSUE 179
I. FACTUAL DISCUSSION 181
II. ANALYSIS 190

CHAPTER NINE: CLEMENCY **199**

INTRODUCTION TO THE ISSUE 199
I. FACTUAL DISCUSSION 201
II. ANALYSIS 208

CHAPTER TEN: VOIR DIRE AND CAPITAL JURY INSTRUCTIONS **219**

INTRODUCTION TO THE ISSUE 219

I. FACTUAL DISCUSSION 220
II. ANALYSIS 251

CHAPTER ELEVEN: JUDICIAL INDEPENDENCE 261

INTRODUCTION TO THE ISSUE 261
I. FACTUAL DISCUSSION 262
II. ANALYSIS 272

CHAPTER TWELVE: THE TREATMENT OF RACIAL AND ETHNIC MINORITIES 281

INTRODUCTION TO THE ISSUE 281
I. FACTUAL DISCUSSION 282
II. ANALYSIS 284

CHAPTER THIRTEEN: MENTAL RETARDATION, MENTAL ILLNESS, AND THE DEATH PENALTY 295

INTRODUCTION TO THE ISSUE 295
I. FACTUAL DISCUSSION 297
II. ANALYSIS - MENTAL RETARDATION 312

APPENDIX ..... A

EXECUTIVE SUMMARY

INTRODUCTION

Fairness and accuracy together form the foundation of the American criminal justice system. As our capital punishment system now stands, however, we fall short in protecting these bedrock principles. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that there is a crisis in our country's death penalty system and that capital jurisdictions too often provide neither fairness nor accuracy. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine sixteen U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. The Project is conducting state assessments in Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Nevada, Ohio, Oklahoma, Pennsylvania, Tennessee, South Carolina, Texas, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

These assessments examine the above-mentioned jurisdictions' death penalty systems, using as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus,

clemency proceedings, jury instructions, an independent judiciary, the treatment of racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project includes for review five new areas associated with death penalty administration, including the preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each state's assessment has been or is being conducted by a state-based Assessment Team, which is comprised of or has access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) evolution of the state death penalty statute; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutors; (6) defense services during trial, appeal, and state post-conviction proceedings; (7) direct appeal and the unitary appeal process; (8) state post-conviction relief proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.

The assessment findings provide information about how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law of the land in each of the assessment states and because the ABA has no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty. Moreover, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Georgia death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

Despite the diversity of backgrounds and perspectives among the members of the Georgia Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team is unanimous in many of the conclusions. Even though not all team members support the call for a moratorium, they are unanimous in their belief that the body of recommendations as a whole would, if implemented, significantly enhance the accuracy and fairness of Georgia's capital punishment system.

II. HIGHLIGHTS OF THE REPORT

A. Overview

To assess fairness and accuracy in Georgia's death penalty system, the Georgia Death Penalty Assessment Team researched twelve issues: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) the treatment of racial and ethnic minorities; and (12) mental retardation and mental illness. The Georgia Death Penalty Assessment Report summarizes the research on each issue and analyzes the level of compliance with the relevant ABA Recommendations.

B. Problem Areas

The assessment findings indicate a need to reform a number of areas within Georgia's death penalty system to ensure that it provides a fair and accurate system for every person who faces the death penalty. The Georgia Death Penalty Assessment Team finds the following problem areas most in need of reform:

- Inadequate Defense Counsel at Trial - Although the State of Georgia has recently instituted a statewide capital defender system, which provides experienced attorneys for indigent defendants in capital proceedings at trial and on direct appeal, it is unclear whether funding will be available to enable it to function as planned. Moreover, it must be noted that the trials and direct appeals of defendants presently on death row preceded the creation of the statewide capital defender system; those defendants may or may not have had adequate counsel.
- Lack of Defense Counsel for State Habeas Corpus Proceedings - The State of Georgia is virtually alone in not providing indigent defendants sentenced to death with counsel for state habeas proceedings. The lack of counsel on state habeas, particularly when combined with the case law that allows habeas judges to adopt the state's findings of fact verbatim, creates a situation where this critical constitutional safeguard is so undermined as to be ineffective.
- Inadequate Proportionality Review - In conducting its proportionality review, since 1994 the Georgia Supreme Court has looked only to cases where the death penalty was imposed under similar circumstances, rather than also considering cases in which the death penalty was sought but not imposed and cases in which the death penalty could have been sought but was not. Proportionality review that considers only cases where the death sentence was imposed is inherently limited and incapable of uncovering potentially serious disparities—whether those disparities are geographical, racial or ethnic, or attributable to any other inappropriate factor.
- Inadequate Pattern Jury Instructions on Mitigation - Research establishes that not all Georgia capital jurors understand what law governs their decision to impose or

not impose a death sentence. Forty percent (specifically 40.5%) of interviewed Georgia capital jurors did not understand that they could consider any evidence in mitigation and 62.2% believed that the defense had to prove mitigating factors beyond a reasonable doubt. This confusion possibly can be attributed to the fact that the suggested pattern jury instructions provide little to no guidance on mitigating circumstances. The instructions do not list any factors that might be considered in mitigation, explain the burden of proof, or explain that jurors need not be unanimous in finding mitigating circumstances. Death sentences resulting from juror confusion or mistake are not tolerable.

- Racial Disparities in Georgia Capital Sentencing - Both the race of the defendant and the race of the victim predict who is sentenced to death in the State of Georgia, with white suspects and those who kill white victims more likely to be sentenced to death than black suspects and those who kill black victims.[1] "The data show that among all homicides with known suspects, those suspected of killing whites are 4.56 times as likely to be sentenced to death as those who are suspected of killing blacks."[2] Based on this data, race clearly matters in capital sentencing in Georgia.
- Inappropriate Burden of Proof for Mentally Retarded Defendants Facing the Death Penalty - "Beyond a reasonable doubt" is the highest standard of proof known to American law. Of the twenty-six states that have adopted statutes prohibiting the execution of the mentally retarded, Georgia is the only state that requires the defendant to prove his/her mental retardation beyond a reasonable doubt.[3] The effect of this is exacerbated by the failure of the Georgia Suggested Pattern Jury Instructions to explain that mental retardation is a mitigating circumstance that may be considered by the jury during the sentencing phase of a capital trial.
- Death Penalty for Felony Murder - Georgia law allows for the imposition of a death sentence when the defendant has been convicted either of malice murder or of felony murder. Malice murders are those murders committed with express malice (intent to kill) or implied malice (an abandoned and malignant heart/a reckless disregard for human life). Felony murder is a killing in the commission of a felony irrespective of malice; a conviction of felony murder does not require a finding of an intent to kill, or of a reckless indifference to life. The death penalty should only be imposed where the jury has found the defendant acted with either express or implied malice.

---

[1] *See* Raymond Paternoster, Glen Pierce, & Michael Radelet, *Race and Death Sentencing in Georgia, 1989-1998*, *in* AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT app., at S-T (2006).

[2] *Id.*

[3] John H. Blume, Summaries of Relevant Cases and Legislation Resulting From *Atkins v. Virginia*, 536 U.S. 304 (2002), at 48-50 (Dec. 2, 2005) (unpublished manuscript, on file with author). We note that in cases in which the capital trial's guilt/innocence phase took place before July 1, 1988, the State of Georgia requires the defendant to establish his/her mental retardation by a preponderance of the evidence.

C. Georgia Death Penalty Assessment Team Recommendations

In addition to endorsing the recommendations found in each section of the report, the Georgia Death Penalty Assessment Team makes the following recommendations:

1. The State of Georgia should sponsor a study of the administration of its death penalty system to determine the existence or non-existence of unacceptable disparities, racial, geographic, or otherwise.
2. In order to make the concept of proportionality meaningful and to address the racial disparities indicated by the available data, the State of Georgia should establish a statewide clearinghouse to review decisions to seek the death penalty. This clearinghouse should also collect data on all death-eligible cases and make this data available to the Georgia Supreme Court for use in conducting its proportionality review.
3. The State of Georgia should restrict death penalty cases to those where the defendant is found guilty of malice murder, either express or implied.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Georgia, our research establishes that at this point in time, the State cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Because of that, it is the conclusion of the members of the Georgia Death Penalty Assessment Team, except Harry D. Dixon, Jr., that the State of Georgia should impose a moratorium on both capital prosecutions and on executions until such time as the State is able to appropriately address the problem areas identified throughout this Report, and in particular in the Executive Summary. Although Mr. Dixon agrees with a number of the findings and the recommendations of the report, he does not agree that a moratorium should be imposed on either prosecutions or executions.

The American Bar Association, while calling for a moratorium on executions, has not adopted policies on the issues discussed in recommendations #2 and 3 nor has it endorsed a moratorium on capital prosecutions.

III. SUMMARY OF THE REPORT

Chapter One: An Overview of Georgia's Death Penalty System

In this Chapter, we examined the demographics of Georgia's death row, the statutory evolution of Georgia's death penalty scheme, and the progression of an ordinary death penalty case through Georgia's system from arrest to execution.

Chapter Two: Collection, Preservation and Testing of DNA and Other Types of Evidence

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on the state's

laws and on its law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. In this Chapter, we examined Georgia's laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and we assessed whether Georgia complies with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Georgia's overall compliance with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the chart below.[4]

Collection, Preservation, and Testing of DNA and Other Types of Evidence					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***[5]	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***[6]	***Not Applicable***
Recommendation #1: Preserve all biological evidence for as long as the defendant remains incarcerated.	X				
Recommendation #2: Defendants and inmates should have access to biological evidence, upon request, and be able to seek appropriate relief notwithstanding any other provision of the law.		X			
(Chart Continued Below)					

[4] Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the Analysis section of each Chapter.

[5] Given that a majority of the ABA's recommendations are composed of several parts, we used the term "partially in compliance" to refer to instances in which the State of Georgia meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

[6] In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Georgia death penalty. The Project would welcome notification of any omissions in this report so that they may be corrected in any future reprints.

Collection, Preservation, and Testing of DNA and Other Types of Evidence (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #3: Law enforcement agencies should establish and enforce written procedures and policies governing the preservation of biological evidence.				X	
Recommendation #4: Law enforcement agencies should provide training and disciplinary procedures to ensure preparedness and accountability.		X			
Recommendation #5: Ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.				X	
Recommendation #6: Provide adequate funding to ensure the proper preservation and testing of biological evidence.				X	

The State of Georgia requires governmental entities in possession of any physical evidence from a criminal case to preserve all biological material until a defendant is executed and allows inmates convicted of a capital felony, except those convicted of treason or aircraft hijacking, to request post-conviction DNA testing. However, certain procedural ambiguities and restrictions make it difficult for these inmates to obtain hearings on post-conviction DNA motions and/or relief based on the DNA test results. These procedural ambiguities and restrictions are particularly problematic and include:

- The appropriate mechanism for requesting post-conviction DNA testing—either through an extraordinary motion for a new trial or a motion requesting post-conviction DNA testing filed separate and apart from any other motion—is unclear;
- The time and numerical limitations for motions requesting post-conviction DNA testing filed separate and apart from any other motion are unclear;
- Judges are not required to hold a hearing on motions requesting post-conviction DNA testing (regardless of the form of the motion);
- Judges may grant a hearing on a motion for post-conviction DNA testing if, and only if, the motion "states" two specific factors and "shows or provides" eight other specific factors. This requirement is extremely restrictive, given that inmates are not provided with counsel to assist with or to draft the motion; and
- Inmates are limited to one extraordinary motion for a new trial, regardless of the existence of exculpatory DNA evidence.

To eliminate at least some of these ambiguities and restrictions, the State of Georgia should clarify which mechanism is appropriate for requesting post-conviction DNA testing and should outline its corresponding time and numerical limitations, if any.

Chapter Three: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Incorrect identifications and confessions can mislead police, prosecutors, defense attorneys, judges and juries into focusing the case on one person, too often resulting in an erroneous conviction. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this Chapter, we reviewed Georgia's laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA's policies on law enforcement identifications and interrogations.

A summary of Georgia's overall compliance with the ABA's policies on law enforcement identifications and interrogations is illustrated in the chart below.

Law Enforcement Identifications and Interrogations					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar Associations Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photspreads, and training on non-suggestive techniques for interviewing witnesses.		X			
Recommendation #3: Law enforcement agencies and prosecutors offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.				X	

Law Enforcement Identifications and Interrogations (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #4: Videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.		X			
Recommendation #5: Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.				X	
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.	X				
Recommendation #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.	X				

We commend the State of Georgia for taking certain measures which likely reduce the risk of inaccurate eyewitness identifications and false confessions; for example:

- Law enforcement officers in Georgia are required to complete a basic training course that instructs trainees on avoiding suggestive methods of interviewing witnesses;
- At least seven police departments in Georgia regularly record the entirety of custodial interrogations;
- Courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications; and
- The Georgia Suggested Pattern Jury Instructions in Criminal Cases contain an instruction that provides the jury with factors to consider when determining the reliability of an eyewitness identification.

Despite these measures, the State of Georgia does not require law enforcement agencies to adopt procedures on identifications and interrogations. Certain Georgia governmental offices and associations, however, do provide a framework for law enforcement agencies to adopt procedures on identifications and interrogations.

- The Georgia Association of Chiefs of Police has adopted the Sample Law Enforcement Manual (SLEOM), which is derived from the Model Law Enforcement Operations Manual authored by the Georgia Department of Community Affairs. The SLEOM contains a number of specific procedures for conducting lineups and photospreads, some of which are at least in partial compliance with the ABA Recommendations. However, the extent to which Georgia law enforcement agencies have adopted the SLEOM as a mandatory internal procedure is unknown.
- A number of law enforcement agencies in Georgia have obtained certification under the Georgia Association of Chiefs of Police Law Enforcement Certification Program (GLECP) and/or under the Commission on Law Enforcement Accreditation Standards for Law Enforcement Agencies (CALEA), which require agencies to establish written directives on "conducting follow-up investigations," including identifying suspects. Neither the GLECP nor CALEA, however, requires these agencies to adopt specific procedures on conducting lineups and photospreads. It is possible that in complying with the GLECP and CALEA an agency could create specific procedures for lineups and photospreads that are in compliance with the ABA's Recommendations, but we were unable to obtain the written directives adopted by all law enforcement agencies to assess whether they comply with the recommendations.

In order to ensure that all law enforcement agencies conduct lineups and photospreads in a manner that maximizes their likely accuracy, the State of Georgia should require all law enforcement agencies to adopt procedures on lineups and photospreads that are consistent with the ABA's recommendations.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts' increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be understated. In this Chapter, we examined these issues as they pertain to Georgia and assessed whether Georgia's laws, procedures, and practices comply with the ABA's policies on crime laboratories and medical examiner offices.

A summary of Georgia's overall compliance with the ABA's policies on crime laboratories and medical examiner offices is illustrated in the chart below.

Crime Laboratories and Medical Examiner Offices					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.		X			
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.				X	

Georgia does not require crime laboratories or medical examiner offices to be accredited, but all of the crime laboratories in the Division of Forensic Sciences of the Georgia Bureau of Investigation (the Division) are accredited and are required by the accrediting bodies and by Georgia statutory law to adopt written standards and procedures on handling, preserving, and testing forensic evidence. Neither the accrediting bodies nor Georgia statutory law, however, require Division crime laboratories to publish these standards and procedures. In fact, Georgia statutory law explicitly exempts these standards from the Georgia Administrative Procedure Act, which means that the standards do not have to be published or made available for inspection in order to become effective. Therefore, the contents of the Division standards and procedures are unknown.

In addition to the secrecy surrounding the Division standards and procedures, the adequacy of the funding provided to Division crime laboratories is also in question. The Division's annual reports indicate that Division crime laboratories are experiencing "budget shortfalls" and "budget constraints," resulting in a personnel shortage and case backlog. The Division's 2004 annual report states: "The individual caseload for scientists remains high, but the overall case production of the [Division] has fallen well short of the demand for services. The result is a greatly increased backlog over the previous year. The backlog is expected to be in excess of 36,000 cases by the end of FY'05."

Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where prosecutors have enormous discretion deciding whether or not to seek the death penalty.

In this Chapter, we examined Georgia's laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA's policies on prosecutorial professionalism.

A summary of Georgia's overall compliance with the ABA's policies on prosecutorial professionalism is illustrated in the chart below.

Prosecutorial Professionalism					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Each prosecutor's office should have written polices governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.			X		
Recommendation #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.			X		
Recommendation #3: Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.		X			
Recommendation #4: Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.		X			
Recommendation #5: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.				X	
Recommendation #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.	X				

The State of Georgia does not require district attorney's offices to establish policies on the exercise of prosecutorial discretion or on evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit. The State of Georgia, however, has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The State of Georgia has entrusted the State Bar of Georgia with investigating grievances and disciplining members of the State Bar of Georgia, including prosecutors.
- The State Bar of Georgia has established the Georgia Rules of Professional Conduct, which address prosecutorial discretion in the context of the role and responsibilities of prosecutors.
- The State of Georgia has established the Prosecuting Attorneys' Council to assist prosecuting attorneys throughout the state in a number of different ways, including by offering courses discussing the concept of guided prosecutorial discretion and capital litigation.
- The Georgia Supreme Court has held prosecutors responsible for disclosing not only evidence of which s/he is aware, but also "favorable evidence known to others acting on the government's behalf."

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, as well as full and fair compensation to the lawyers who undertake capital cases and resources for investigators and experts. Individual jurisdictions must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this Chapter, we examined Georgia's laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA's policies on defense services.

A summary of Georgia's overall compliance with the ABA's policies on defense services is illustrated in the chart below.

Defense Services					
Recommendation / *Compliance*	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)—The Defense Team and Supporting Services		X			
Recommendation #2: Guideline 5.1 of the ABA Guidelines—Qualifications of Defense Counsel		X			
Recommendation #3: Guideline 3.1 of the ABA Guidelines—Designation of a Responsible Agency			X		
Recommendation #4: Guideline 9.1 of the ABA Guidelines—Funding and Compensation				X	
Recommendation #5: Guideline 8.1 of the ABA Guidelines—Training		X			

Georgia's new indigent legal representation system, which largely became effective on January 1, 2005, has improved the delivery of defense services to capital defendants by establishing a state-funded capital defenders office—the Office of the Georgia Capital Defender (GCD)—that handles all death penalty cases, except in cases of a conflict of interest. The system, nonetheless, falls short of being in full compliance with the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) for a number of reasons:

- The State of Georgia does not guarantee counsel at every stage of the legal proceedings. Indigent defendants charged with a capital felony for which the death penalty is being sought have a right to appointed counsel at trial and on direct appeal. However, indigent death-sentenced inmates are not entitled to appointed counsel for state post-conviction or clemency proceedings.
- Georgia statutory law contains only minimal qualification requirements for attorneys handling death penalty cases. We commend the Georgia Public Defender Standards Council (GPDSC)—the body responsible for overseeing the indigent legal representation system— for adopting the ABA Guidelines as the GPDSC Death Penalty Defense Standards. However, the GPDSC adopted the ABA Guidelines only where they do not contradict Georgia law and we have been told that the standards have a "fiscal impact," thus requiring ratification by the General Assembly to become effective.
- The State of Georgia has failed to remove the judiciary from the attorney appointment process.
- The amount of funding provided by the State of Georgia to GCD does not appear to be sufficient to cover the costs associated with all of the pending death

penalty cases. The budget for the GCD was based on a projected forty death penalty cases and an additional nine conflict death penalty cases per year. However, as of early December 2005, forty-seven capital prosecutions—thirty-five handled by GCD and twelve handled by a conflict defender—had commenced. In addition to these new cases beginning in 2005, there were also twelve capital cases already in the trial stage in which the GCD represents the defendant.

Chapter Seven: The Direct Appeal Process

The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion. One of the best ways to ensure that the direct appeal process works as it is intended is through meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. In this Chapter, we examined Georgia's laws, procedures, and practices relevant to the direct appeal process and assessed whether they comply with the ABA's policies on the direct appeal process.

A summary of Georgia's overall compliance with the ABA's policies on the direct appeal process is illustrated in the chart below.

The Direct Appeal Process					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.		X			

Section 17-10-35(c)(3) of the Official Code of Georgia Annotated requires that in reviewing the proportionality of a death sentence, the Georgia Supreme Court must determine whether the defendant's sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In conducting its proportionality review, however, the Georgia Supreme Court limits its review to cases where the death penalty was actually imposed upon similar circumstances. In fifty-five death-sentence cases between 1994 and 2004, the Georgia Supreme Court's proportionality review consisted of reviewing only cases in which a death sentence had been imposed. The Court only expands its review to cases where the death penalty was not imposed when a defendant claims that his/her sentence is disproportionate to that of his/her co-conspirator.

Additionally, the Georgia Supreme Court's opinions generally devote only one or two sentences to explaining the proportionality review analysis. These sentences generally repeat the language of section 17-10-35(c)(3) by stating, "[T]he death sentence is not disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. The similar cases listed in the Appendix support the imposition of the death penalty in this case."

Given the scope of the cases considered by the Court and the cursory manner in which the proportionality review is explained, the proportionality review conducted by the Georgia Supreme Court appears to be of limited value. In order to increase the meaningfulness of its proportionality review, the Georgia Supreme Court should review cases in which the death penalty was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.

Chapter Eight: State Post-Conviction Proceedings

The importance of state post-conviction proceedings to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, all post-conviction proceedings should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. In this Chapter, we examined Georgia's laws, procedures, and practices relevant to state post-conviction proceedings and assessed whether they comply with the ABA's policies on state post-conviction.

A summary of Georgia's overall compliance with the ABA's policies on state post-conviction proceedings is illustrated in the chart below.

State Post-Conviction Proceedings					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.				X	
Recommendation #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.				X	
Recommendation #3: Judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.				X	
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.			X		
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.			X		
Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.			X		

State Post-Conviction Proceedings (Con't.)					
Recommendation / Compliance	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #7: The state should establish post-conviction defense organizations to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.			X		
Recommendation #8: The state should appoint post-conviction defense counsel whose qualifications are consistent with the ABA Guidelines on the Appointment and Performance of Death Counsel in Death Penalty Cases. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.			X		
Recommendation #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.		X			
Recommendation #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.		X			
Recommendation #11: State courts should apply the harmless error standard of *Chapman v. California*, requiring the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.	X				
Recommendation #12: During the course of a moratorium, a "blue ribbon" commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.					X

The State of Georgia has adopted some laws and procedures that facilitate the adequate development and judicial consideration of claims—i.e., there are no filing deadlines for state habeas petitions and courts permit second and successive petitions under certain circumstances. But some laws and procedures have the opposite effect, such as:

- Georgia law allows the habeas judge, after requesting that either party file proposed findings of fact and conclusions of law, to copy verbatim a party's proposed findings and conclusions in the final order of the court—which

undermines a habeas judge's duty to exercise independent judgment in deciding cases;

- Georgia law allows the habeas judge to shorten the time periods for filing motions, pursuing discovery, and filing briefs—which potentially inhibits the full development of the record upon which the habeas court bases its decision; and
- Georgia law applies the "cause and prejudice" standard for waivers of constitutional and state law claims—which means that review of potentially viable claims can be barred even without the petitioner's "knowing, understanding, and voluntary" waiver.

The effect of this on the adequate development and judicial consideration of claims is even more acute in a habeas proceeding where the petitioner may not necessarily be represented by counsel. In Georgia, death-sentenced inmates do not have a right to appointed counsel after direct appeal, leaving death-sentenced inmates to represent themselves or to obtain pro bono representation in order to pursue state post-conviction relief.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death-row inmate, it is imperative that clemency decision makers evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision making. In this Chapter, we reviewed Georgia's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Georgia State Board of Pardons and Paroles' criteria for considering and deciding petitions and inmates' access to counsel, and assessed whether they comply with the ABA's policies on clemency.

A summary of Georgia's overall compliance with the ABA's policies on clemency is illustrated in the chart below.

Clemency					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.				X	
Recommendation #2: The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment.				X	
Recommendation #3: Clemency decision makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction.				X	
Recommendation #4: Clemency decision makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about inmate's guilt.				X	
Recommendation #5: Clemency decision makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.				X	
Recommendation #6: Death row inmates should be represented by counsel and such counsel should have qualifications consistent with the ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases.			X		
Recommendation #7: Prior to clemency hearings, counsel should be entitled to compensation and access to investigative and expert resources and provided with sufficient time to develop claims and to rebut state's evidence.		X			
Recommendation #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.			X		

Clemency (Con't.)					
Recommendation / *Compliance*	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with petitioners.			X		
Recommendation #10: Clemency decision makers should be fully educated and should encourage public education about clemency powers and limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.			X		
Recommendation #11: Clemency determinations should be insulated from political considerations or impacts.				X	

The State Board of Pardons and Paroles (the Board) is required to conduct a "complete and fair" review of all petitions for commutations. However, the scope of a "complete and fair" review is not detailed in either the Official Code of Georgia Annotated or the Rules of the State Board of Pardons and Paroles. Thus, it is unclear whether the Board is required to consider any of the factors included in Recommendations #2-5.

In conducting a "complete and fair" review, the Board or some of its members "generally" hold an appointment/hearing on the merits of an inmate's request for clemency. However, the Board is not required to hold an appointment/hearing on every petition, and if and when the Board holds an appointment/hearing, the purpose of the appointment/hearing is to hear from "representatives for the condemned inmate," not from the inmate himself/herself, and it is closed to the public. A separate appointment/hearing may be held to hear arguments from those opposing the clemency request.

Not only is the criteria considered by the Board unknown and the appointment/hearing to consider the inmate's clemency request not necessarily open to the inmate, but other parts of the clemency decision making process are confidential as well.

- The Board is not required to release to the public the evidence it considered during the clemency process.
- The Board is not required to release its reasons for granting or denying an inmate's clemency petition.
- The Board is not required to release its vote count on the inmate's petition.

Given the ambiguities and confidentiality surrounding Georgia's clemency process, the State of Georgia should adopt more explicit factors to guide the consideration of clemency petitions and should open the appointment/hearing and decision making process to ensure transparency.

Chapter Ten: Voir Dire and Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed and the "awesome responsibility" of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses the jury about the applicable law and the extent of their responsibilities. In this Chapter, we reviewed Georgia's laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA's policies on capital jury instructions.

A summary of Georgia's overall compliance with the ABA's policies on capital jury instructions is illustrated in the chart below.

Capital Jury Instructions					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Jurisdictions should work with certain specialists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.			X		
Recommendation #2: Jurors should receive written copies of court instructions to consult while the court is instructing them and while conducting deliberations.			X		
Recommendation #3: Trial courts should respond meaningfully to jurors' requests for clarification of instructions.				X	
Recommendation #4: Trial courts should instruct jurors clearly on available alternative punishments and should, upon the defendant's request during the sentencing phase, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state.		X			
Recommendation #5: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.		X			
Recommendation #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			X		
Recommendation #7: In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.					X

The State of Georgia has suggested pattern jury instructions covering the sentencing phase of a capital trial. These instructions are informative: they include, for example, definitions of mitigating and aggravating circumstances and an explanation of the meaning of and difference between the alternative sentencing options to death. But the instructions are not broad enough to fully inform jurors of the applicable law.

Jurors' understanding of the meaning of mitigation, and of how they may bring mitigating factors to bear in their consideration of capital punishment, is vital to the capital sentencing process. Apart from the definition of mitigating circumstances, however, the suggested pattern jury instructions do not include specific information on the consideration of mitigating circumstances.

- The suggested pattern jury instructions do not contain a list of mitigating circumstances and the Georgia Supreme Court has found that judges do not have to instruct juries on the relevant mitigating circumstances present in the case.
- The suggested pattern jury instructions do not contain the burden of proof for mitigating circumstances or the requisite number of jurors necessary to find the existence of mitigating circumstances.

Additionally, although the suggested pattern jury instructions contain a definition of mitigating circumstances, the Georgia Supreme Court has found that judges do not have to provide the definition, as mitigation is a term of common usage and meaning.

Given the limited instruction that is provided to juries on mitigating evidence, it is no surprise that 40.5% of interviewed Georgia capital jurors did not understand that they could consider any evidence in mitigation and that 62.2% believed that the defense had to prove mitigating factors beyond a reasonable doubt. Similarly, 89% of interviewed Georgia capital jurors did not understand that they could consider any factor in mitigation regardless of whether other jurors agreed. Georgia capital jurors are confused not only about the scope of mitigation evidence that they may consider but also about the applicable burden of proof and the unanimity of finding required for mitigating factors.

The State of Georgia should revise the suggested pattern jury instructions (i.e., include a list of mitigating circumstances and the burden of proof for mitigating circumstances) to ensure that jurors understand applicable law.

Chapter Eleven: Judicial Independence

With increasing frequency, judicial elections, appointments, and confirmations are being influenced by consideration of judicial nominees' or candidates' purported views of the death penalty or of judges' decisions in capital cases. This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the issue of capital punishment. In this Chapter, we reviewed Georgia's laws, procedures, and practices on the judicial election/appointment and decision making processes and assessed whether they comply with the ABA's policies on judicial independence.

A summary of Georgia's overall compliance with the ABA's policies on judicial independence is illustrated in the chart below.

Judicial Independence					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: States should examine the fairness of their judicial election/appointment process and should educate the public about the importance of judicial independence and the effect of unfair practices on judicial independence.			X		
Recommendation #2: A judge who has made any promise regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.				X	
Recommendation #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases; Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; Bar associations and community leaders should oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.				X	
Recommendation #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.				X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.				X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.				X	

Due to the Eleventh Circuit's decision in *Weaver v. Bonner* and the resulting amendments to the Georgia Code of Judicial Conduct, judicial campaigns in Georgia have changed in two ways: (1) judicial candidates are no longer prohibited from personally soliciting campaign contributions; and (2) judicial candidates are no longer prohibited from using false, misleading, and deceptive communications. These changes, combined with the rising costs and increasing political nature of Georgia judicial campaigns, have called

into question the fairness of the appointment/election process in Georgia for a number of reasons:

- Judicial candidates continue to campaign on criminal justice issues, including the death penalty. In a 2004 judicial election, a judicial candidate running for an open seat on the Georgia Court of Appeals ran television commercials characterizing his opponents as "high-priced criminal defense lawyers [who] work for the kind of people they once sent to jail." Similarly, in the Cobb County judicial race of 2004, a judicial candidate challenging an incumbent superior court judge distributed campaign literature featuring a picture of the current district attorney with the message, "I support the death penalty, but some judges don't. Consider Dorothy Robinson [the incumbent judge]."
- The rising costs of judicial campaigns tend to increase the influence of money in the judicial selection process. In 2004, two candidates for one contested Georgia Supreme Court seat raised a combined total of more than $815,000. Just two years earlier in 2002, candidates for two contested Georgia Supreme Court seats raised a combined total of approximately $700,000.
- The rising costs of judicial campaigns require candidates and/or their agents to solicit an increasing amount of campaign contributions. Although authorized to personally solicit campaign contributions, judicial candidates are encouraged to establish a committee to secure and manage campaign funds. They are not restricted from soliciting funds from individuals or organizations that could have an interest in the cases s/he will decide as a judge.

Chapter Twelve: The Treatment of Racial and Ethnic Minorities

A pattern of racial discrimination persists today, in part because courts tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can infect the entire trial process with a racial impact. To eliminate the impact of race in death penalty administration, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. In this Chapter, we examined Georgia's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies.

A summary of Georgia's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the chart below.

The Treatment of Racial and Ethnic Minorities					
Recommendation / *Compliance*	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.		X			
Recommendation #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potentially capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.		X			
Recommendation #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.			X		
Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.			X		
Recommendation #5: Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a *prima facie* case is established, the state should have the burden of rebutting it by substantial evidence.			X		

The Treatment of Racial and Ethnic Minorities (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.		X			
Recommendation #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.			X		
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.			X		
Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.				X	
Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.			X		

Between February 1, 1993 and August 1, 1995, the State of Georgia, through the Georgia Supreme Court's Commission on Racial and Ethnic Bias in the Court System, investigated the impact of racial bias in the criminal justice system and made recommendations to "correct[] any problems or misconceptions that exist within the court system and to assure equal opportunity and treatment now and in the future." The Commission's investigation did not include an assessment of the impact of racial bias in the administration of the death penalty because "[t]he large number of factors involved in a death penalty decision . . . , combined with the numerous entities involved in these decisions, . . . [we]re beyond the resources of the Commission to adequately assess."

The Commission's report included a number of findings and recommendations on the criminal justice system as a whole, but it does not appear that the recommendations have been effectively implemented in the State of Georgia.

- The Commission found that "[t]here is a pervasive lack of adequate [criminal] data from which conclusions and policy decisions could be made. The Commission had wanted to investigate potential racial disparities among persons convicted for offenses such as criminal trespass or simple burglary. Limitations in the available databases precluded such analyses." Today, the State of Georgia does not collect demographic information on defendants and victims in all death penalty cases, including death-eligible or death-sought cases. Rather, it only collects information on cases in which the defendant was sentenced to death. The State of Georgia should collect this data to facilitate the evaluation of the impact of racial discrimination on the death penalty system
- The Commission expressed "concern" in its report over the fact that "the number of persons receiving a death sentence or charged with a death penalty offense is disproportionately African-American." Since the release of the Commission's report, it does not appear as if the racial disparities identified as a "concern" by the Commission have diminished. For example, as of August 1998, fifty-five of the 119 inmates on Georgia's death row were black and of the 88 persons awaiting death penalty trial, 53 were black males, 26 were white males, 2 were black females, 4 were white females, and 3 were Hispanic males.[7]
- The Commission found that "[o]ver 81% of minority attorneys and 58% of whites shared the perception that [jury] verdicts are influenced by jurors' racial stereotypes." Despite this finding, neither Georgia statutory law nor case law requires jury instructions informing jurors that it is improper to consider any racial factors in their decision making and instructing them to report any evidence of racial discrimination in jury deliberations. In an effort to address this finding, the State of Georgia should revise the pattern jury instructions to include an instruction consistent with Recommendation #8.

The State of Georgia should examine the impact of racial discrimination in the criminal justice system, especially in capital sentencing, and should develop new procedures that facilitate eliminating discrimination on the basis of race.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant is mentally retarded. This discretion includes, but is not limited to, the ability to define

---

[7] Michael Mears, Georgia Capital Defender Office, *Georgia Needs a Racial Justice Act*, *at* http://www.gacapdef.org/docs/articles_mears_racial_justice_act.htm (last visited on Oct. 7, 2005).

mental retardation and the burden of proof for mental retardation claims. In this Chapter, we reviewed Georgia's laws, procedures, and practices pertaining to mental retardation and the death penalty and assessed whether they comply with the ABA's policy on mental retardation and the death penalty.

A summary of Georgia's overall compliance with the ABA's policies on mental retardation and the death penalty is illustrated in the chart below.

Mental Retardation and Mental Illness and the Death Penalty					
Compliance / **Recommendation**	***In Compliance***	***Partially in Compliance***	***Not in Compliance***	***Insufficient Information to Determine Statewide Compliance***	***Not Applicable***
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.		X			
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation in capital defendants and death row inmates.		X			
Recommendation #3: Jurisdictions should ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their clients' mental limitations. These attorneys should have sufficient training, funds, and resources.				X	
Recommendation #4: For cases commencing after *Atkins v. Virginia* or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.		X			

Mental Retardation and Mental Illness and the Death Penalty (Con't.)					
Compliance / Recommendation	*In Compliance*	*Partially in Compliance*	*Not in Compliance*	*Insufficient Information to Determine Statewide Compliance*	*Not Applicable*
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.		X			
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.			X		
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.			X		

Because Georgia has prohibited the execution of mentally retarded offenders since 1989, the *Atkins* decision had little to no effect in the State of Georgia. In fact, Georgia was the first state to statutorily prohibit the execution of certain mentally retarded offenders. The procedures adopted by the State of Georgia to determine mental retardation, however, do not fully comply with the ABA's recommendations on mental retardation, and some of the state's procedures are particularly problematic.

- Georgia's statutory definition of mental retardation is similar to the American Association on Mental Retardation's definition, as required by Recommendation #1. The Georgia Supreme Court, however, has recognized the IQ range of "70 or below" as being "an indication of significantly subaverage intellectual functioning." The Court has not addressed the issue of whether an IQ score in the low to mid-70s disqualifies a defendant or death-row inmate from being found to have mental retardation, and Georgia trials courts, in at least some mental retardation cases, have interpreted the statute to permit the jury to consider IQ scores as high as 75 as possibly being supportive of a mental retardation verdict, in view of the possibility of a 5 point margin of error.
- The State of Georgia places the burden of proving mental retardation on the defendant, rather than requiring the prosecution to disprove the defendant's substantial showing of mental retardation, as required by Recommendation #5.
- The State of Georgia requires defendants to prove their mental retardation beyond a reasonable doubt—which is inconsistent with Recommendation #5—except in

cases in which the capital trial's guilt/innocence phase took place before July 1, 1988, in which case the burden of proof is by a preponderance of the evidence.

To comply with the ABA's recommendations, the State of Georgia should expand the application of the preponderance of the evidence standard to all death penalty cases.

INTRODUCTION

Fairness and accuracy together form the foundation of the American criminal justice system. As our capital punishment system now stands, however, we fall short in protecting these bedrock principles. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that there is a crisis in our country's death penalty system and that capital jurisdictions too often provide neither fairness nor accuracy. In response to this concern, on February 3, 1997, the ABA called for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; and encourages state government leaders to establish moratoriums, undertake detailed examinations of capital punishment laws and processes, and implement reforms.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project decided in February 2003 to examine sixteen U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. The Project is conducting state assessments in Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Nevada, Ohio, Oklahoma, Pennsylvania, Tennessee, South Carolina, Texas, and Virginia. The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies.

These assessments examine the above-mentioned jurisdictions' death penalty systems, using as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus, clemency proceedings, jury instructions, an independent judiciary, the treatment of racial and ethnic minorities, and mental retardation and mental illness. Additionally, the

Project includes for review five new areas associated with death penalty administration, including the preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each state's assessment has been or is being conducted by a state-based Assessment Team, which is comprised of or has access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) evolution of the state death penalty statute; (3) law enforcement tools and techniques; (4) crime laboratories and medical examiners; (5) prosecutors; (6) defense services during trial, appeal, and state post-conviction proceedings; (7) direct appeal and the unitary appeal process; (8) state post-conviction relief proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) the treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.

The assessment findings provide information about how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. Because capital punishment is the law of the land in each of the assessment states and because the ABA has no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty. Moreover, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Georgia death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

Despite the diversity of backgrounds and perspectives among the members of the Georgia Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team is unanimous in many of the conclusions. Even though not all team members support the call for a moratorium, they are unanimous in their belief that the body of recommendations as a whole would, if implemented, significantly enhance the accuracy and fairness of Georgia's capital punishment system.

MEMBERS OF THE GEORGIA DEATH PENALTY ASSESSMENT TEAM

Chair, Dean Anne S. Emanuel
Dean Emanuel is Associate Dean for Academic Affairs and Professor of Law at the Georgia State University College of Law. Prior to joining the GSU Law faculty, Dean Emanuel served as a law assistant to Chief Justice Harold N. Hill of the Georgia Supreme Court, and was the Court's liaison to Trial Court Judges with respect to Uniform Rules. She also practiced law with the firm of Huie, Brown, and Ide, and clerked for Judge Elbert P. Tuttle of the United States Court of Appeals for the Fifth Circuit. Dean Emanuel currently serves on the Board of Directors of the Georgia Center for Law in the Public Interest, and previously served on the Board of Directors of the Atlanta Bar Association, and on the Formal Advisory Opinion Board of the State Bar of Georgia. She received the Governor's Award for Outstanding Service in State Government in 1985. Dean Emanuel received her B.A. from Old Dominion University, and her J.D. with distinction from Emory University, where she was Editor in Chief of the Emory Law Journal and was elected to the Order of the Coif.

Justice Harold G. Clarke
Justice Clarke is a former justice of the Georgia Supreme Court, and is currently Of Counsel to Troutman Sanders LLP in Atlanta, Georgia. Justice Clarke was appointed to the Georgia Supreme Court by Governor George Busbee in December 1979. He was elected Chief Justice in 1990 and served on the court until his retirement in February 1994. Prior to his judicial appointment, Justice Clarke was a member of the Georgia General Assembly from 1961 to 1971. While in the General Assembly, Justice Clarke served as chairperson of the Local Affairs Committee, the Industry Committee, the Journals Committee, and the Constitutional Commissions Committee. Justice Clarke is a member of numerous professional organizations, including the Georgia State Bar, of which he served as President from 1976 to 1977. Justice Clarke is a graduate of the University of Georgia School of Law.

Harry D. Dixon, Jr.
Mr. Dixon is a solo practitioner in Savannah, where he specializes in criminal and civil litigation in both state and federal courts. In 1993, Mr. Dixon was appointed United States Attorney for the Southern District of Georgia by President Bill Clinton. While U.S. Attorney, Mr. Dixon served on the United States Attorney General's Advisory Committee. Prior to his appointment as U.S. Attorney, Mr. Dixon served as Assistant District Attorney for the Waycross Judicial Circuit and was elected District Attorney in 1982. Mr. Dixon was also in private practice at the law firm of Bennett, Pedrick & Bennett in Waycross, Georgia. Mr. Dixon is a member of the National Association of Former United States Attorneys, the National Association of Criminal Defense Lawyers, and the Savannah Bar Association. Mr. Dixon is a graduate of Valdosta State College and of the University of Georgia School of Law.

Professor Timothy W. Floyd
Professor Floyd is a Visiting Professor at Georgia State University College of Law and Director of the Law Student Clinic at the Georgia Capital Defender. He was previously the J. Hadley Edgar Professor of Law at Texas Tech University, where his scholarship and teaching focused on legal ethics and moral theology to the practice of law, legal clinical training, and lawyer disciplinary procedures. Also at Texas Tech, Professor Floyd was faculty advisor to the Board of Barristers, and served as faculty editor of the Faith and the Law Symposium Issue of the Texas Tech Law Review. Professor Floyd is an expert in capital litigation, having served as defense counsel to several cases under the Federal Death Penalty Act of 1994. Professor Floyd also has served as Legal Counsel to the Lieutenant Governor of Georgia, and practiced law at the law firm of Sutherland, Asbill & Brennan. Floyd received both a B.A. and an M.A. from Emory University and his J.D. from the University of Georgia School of Law.

Senator Vincent D. Fort
Senator Fort is currently serving his fourth term as State Senator from the 39th District of Georgia--Fulton County. Senator Fort is the Chairman of the Fulton County Senate Delegation, which coordinates the legislative priorities and proposals of Fulton County and the City of Atlanta. Senator Fort is also a member of several committees within the Senate, including Children and Youth, Special Judiciary, State Institutions and Property, and the Retirement Committee, of which he is Secretary. In addition to serving in the Senate, Senator Fort is a professor of history and political science at Morris Brown College in Atlanta. As an educator, Senator Fort has a special interest in improving the quality of public education. He is currently the chairman of the Georgia Legislative Black Caucus Committee on Education, and was previously chair of the Senate Study Committee on Public Education Disciplinary Reform. Senator Fort received his B.A. from Central Connecticut State College, and his M.A. from Atlanta University.

William R. Ide, III
Mr. Ide is a Partner at McKenna Long & Aldridge LLP in Atlanta, Georgia, where he specializes in corporate finance, securities, and corporate governance and compliance. Mr. Ide is also currently a Senior Fellow of Emory's Conference Board and Director's Institute, as well as a member of the Board of Directors of AFC Enterprises, Inc. Prior to joining McKenna Long, Mr. Ide served as Senior Vice President, General Counsel, and Secretary of Monsanto Corporation. Prior to his service at Monsanto, Mr. Ide was a senior partner at McKenna, Long's predecessor, Long, Alderidge & Norman LLP. Active in his professional community, Mr. Ide was President of the American Bar Association from 1993 to 1994, and was a member of the founding executive committee and board of director's of the Atlanta Committee for the Olympic Games. Mr. Ide also clerked for the Honorable Griffin Bell of the United States Court of Appeals for the Fifth Circuit. Mr. Ide received his B.A. from Washington and Lee University, his M.B.A. from Georgia State University, and his J.D. from the University of Virginia.

Dr. Kay L. Levine
Dr. Levine is an Assistant Professor of Law at the Emory University School of Law, where she teaches criminal law, criminal procedure, victimless crimes, and juvenile justice. Before joining the Emory faculty, Dr. Levine was a Deputy District Attorney in Riverside County, California. She also worked as a criminal defense consultant and as an adjunct professor at the University of California at Berkeley. Dr. Levine clerked for the Honorable David Alan Ezra of the United States District Court for the District of Hawaii. She received her undergraduate degree magna cum laude from Duke University, and her J.D., M.A. and Ph.D. from the University of California at Berkeley.

Professor Jack L. Sammons
Professor Sammons, a graduate of Duke, University of Georgia, and Antioch, is the Griffin B. Bell Professor of Law at Mercer University School of Law where he has taught for over twenty-five years. A founding member of the Chief Justice's Commission on Professionalism, the former Vice-Chair of the Formal Advisory Opinion Board of the State Bar of Georgia, Professor Sammons currently teaches in the areas of Trial Evidence, First Amendment, Law and Religion, and Legal Ethics and serve as a consultant on matters involving the legal ethics and legal education to numerous national, state, and local legal organizations. He is the author of over forty books, articles, chapters, and videos on issues involving the legal profession some of which are widely used as student texts for courses in legal ethics, business ethics, law and religion, and theology. A frequent continuing legal education lecturer, Professor Sammons has also presented recent academic papers at Oxford, University of Arkansas, Notre Dame, and Stetson University. His most recent works are "Cheater!: The Central Moral Admonition of Legal Ethics" and "A Rhetorician's View of Religious Arguments in Political Conversation."

Professor David E. Shipley
Professor Shipley is the Thomas R.R. Cobb Professor of Law at the University of Georgia College of Law, where his teaching and scholarship focus on copyright law and intellectual property, administrative law, and civil procedure and remedies. He joined the University of Georgia College of Law in 1998 as Dean and Professor of Law. In 2003, he returned to full-time teaching and was appointed Thomas R.R. Cobb Professor of Law. Professor Shipley has a long career in law school administration and academia, prior to joining the University of Georgia, he was Dean and Professor at the University of Kentucky College of Law from 1993-1998; Dean, Director of the Law Center, and Professor at the University of Mississippi School of Law from 1990-1993; and Associate Dean and Professor at the University of South Carolina School of Law from 1989-1990. Prior to entering academia, Professor Shipley practiced with the law firm of Tillinghast, Collins & Graham in Providence, Rhode Island. He is also an active member of the American Bar Association and the Association of American Law Schools. Professor Shipley received his B.A. from Oberlin College and his J.D. from the University of Chicago.

J. Douglas Stewart

Mr. Stewart is a Partner at the Gainesville law firm of Stewart, Melvin & Frost LLP. Mr. Stewart has a broad litigation practice, including commercial contract disputes, high asset will contests, banking and financial controversies, as well as both plaintiff and defense side personal injury cases. Mr. Stewart is an active member of the Georgia State Bar, serving as President, President-Elect, and Treasurer, and has been a member of the State Bar Board of Governors since 1972. He was the recipient of the State Bar of Georgia's Distinguished Service Award in 1992. He is currently serving a three-year term as the sixth district member of the Board of Governors of the American Bar Association. Mr. Stewart is also active in his community, having served as President of the Community Concert Association and as an active participant in many local theater and musical productions. Mr. Stewart received both his undergraduate and law degrees from Emory University.

Law Student Researchers

Heather Schafer (Research Coordinator)	Georgia State University School of Law
Stewart Bratcher	Georgia State University School of Law
Julia Blake Eno	Georgia State University School of Law
Ryan Finch	Georgia State University School of Law
J. Colby Jones	Georgia State University School of Law
Jimmy C. Luke	Emory University School of Law
Samir Patel	Georgia State University School of Law
Heather S. Robinson	Georgia State University School of Law
DeLaycee Rowland	Georgia State University School of Law
Sarah Simmons	Georgia State University School of Law
Angela Tarabadka	Mercer University School of Law

CHAPTER ONE

AN OVERVIEW OF GEORGIA'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF GEORGIA'S DEATH ROW

A. Historical Data

In 1973, Georgia reinstituted the death penalty. Between 1973 and 2003, there were 835 cases in which the State of Georgia sought the death penalty.[1] Thirty-nine percent (328 cases) resulted in death sentences, 26.5 percent (222 cases) resulted in the defendant receiving a life sentence with the possibility of parole, and 17.4 percent (145 cases) of defendants in death cases received a life sentence without the possibility of parole.[2] Approximately three percent (specifically 2.8 percent (23 cases)) of defendants in death cases were convicted of a lesser included offense, 2.5 percent (21 cases) of those tried in a death case were acquitted or had their case dismissed, and 11.4 (95 cases) percent of these death cases were still pending completion as of 2003.[3]

Between 1973 and early December 2005, Georgia executed 39 people.[4] Of those, all were male, 26 were white and 13 were black.[5] Five death-row inmates were exonerated between 1973 and 2003.[6]

---

[1] MICHAEL MEARS, AN ANALYSIS OF DEATH PENALTY CASES IN GEORGIA BY JUDICIAL CIRCUITS 1973-2003, at 74 (2004).

[2] The option of sentencing a capital defendant to life in prison without the possibility of parole only became available in 1993. 1993 Ga. Laws 569, § 4 (referencing O.C.G.A. § 17-10-30.1 (1993)).

[3] *Id.*

[4] *See* Death Penalty Information Center, State by State Information, *at* http://www.deathpenaltyinfo.org/state/ (last visited on December 12, 2005) (click on Georgia in the pull-down menu).

[5] Office of Planning and Analysis, Georgia Department of Corrections, *The History of the Death Penalty in Georgia: Executions by Year 1924-2003* (2003) (on file with author).

[6] *See* Death Penalty Information Center, Cases of Innocence 1973 - Present, *available at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=109 (last updated on Aug. 16, 2005). The names of the five exonerated individuals are as follows: James Creamer (released in 1975), Earl Charles (released in 1978), Jerry Banks (released in 1980), Robert Wallace (acquitted at retrial in 1987), and Gary Nelson (released in 1991). The definition of innocence used by the Death Penalty Information Center ("DPIC") in placing defendants on the list of exonerated individuals is that "they had been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id*. Henry Drake, who was convicted of murder and sentenced to death in Georgia in 1977, is not on DPIC's list. Although Drake received an absolute pardon based on actual innocence, he received his absolute pardon after his death sentence had been vacated by the federal appeals court and he was re-sentenced to life in prison, meaning he received an absolute pardon from his life sentence, rather than death row. *See* Drake v. Kemp, 762 F.2d 1449, 1461 (11th Cir. 1985); Gibson v. Turpin, 513 S.E.2d 186, 198 n.28 (Ga. 1999); Forejustice, Wrongly Convicted Database Record: Henry Arthur Drake, *at* http://forejustice.org/db/Drake__Henry_Arthur_.html (last visited on Sept. 20, 2005).

B. A Current Profile of Georgia's Death Row

The Georgia Department of Corrections compiles monthly profiles of the prisoners currently serving death sentences.[7] The following statistics are taken from the November 2005 Inmate Statistical Profile of Georgia's Death Row ("the profile").[8]

1. Current Age and Gender

The profile lists 101 inmates on Georgia's death row—100 men and one woman.[9] Seventy-four inmates on death row are 30-49 years old, thirteen are 20-29 years old, and thirteen are 50 years or older.[10] No death-row inmates in Georgia are more than 69 years old.[11]

2. Race

Georgia's death row consists of fifty-two White inmates—fifty-one men and one woman.[12] Forty-seven men on death row are Black, and one man is Native American.[13] One male inmate did not report his race.[14]

3. Geography: Home County, Childhood Home, County of Conviction[15]

Forty-two of the 101 death-row inmates reported that, before incarceration, they resided in counties with populations of less than 100,000 people.[16] Fifteen inmates reported that they resided in counties with populations of 100,000-250,000 people.[17] Seventeen death-row inmates reported that they resided in counties with population of more than 250,000 people.[18] Ten inmates did not report their home counties.[19]

---

[7] Georgia Department of Corrections, Death Penalty, *at* http://www.dcor.state.ga.us/CORRINFO/ResearchReports/DeathPenalty.html (last visited on Sept. 12, 2005).

[8] Georgia Department of Corrections, Inmate Statistical Profile, *at* http://www.dcor.state.ga.us/pdf/uds05-11.pdf (last visited on Nov. 22, 2005).

[9] *Id.* at 6.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 7.

[13] *Id.*

[14] *Id.*

[15] All population data in this subsection is taken from the Georgia Office of Planning and Budget, Census Data Program, Population for Counties 1960 to 2000 Census, *at* http://www.gadata.org/information_services/Census_Info/2000_county_pop.htm (last visited on Nov 23, 2005).

[16] Georgia Department of Corrections, Inmate Statistical Profile, at 11-12, *at* http://www.dcor.state.ga.us/pdf/uds05-11.pdf (last visited on Nov. 22, 2005).

[17] *Id.*

[18] *Id.*

[19] *Id.*

Sixty-three death-row inmates were convicted in counties with populations of less than 100,000 people.[20] Twenty-two inmates were convicted in counties with populations of 100,000-250,000 people.[21] Sixteen death-row inmates were convicted in counties with populations of more than 250,000 people.[22]

4. Highest Education Attained and IQ Score

Sixteen death-row inmates achieved less than a ninth-grade education.[23] Thirty-seven inmates finished grades nine through eleven, while twenty-four inmates completed high school or obtained their GED.[24] Fifteen inmates enrolled in or completed some post-high school education such as tech school, two-year college, a bachelor's degree, or a master's degree.[25] Ten inmates did not report their highest level of education.[26]

Three death-row inmates have an IQ score of 60-79.[27] Eleven inmates have an IQ score of 80-99, seventeen have an IQ score of 100-119, and four inmates have an IQ score of 120-129.[28] Sixty-six inmates did not report their IQ score.[29]

5. Inmates Receiving Mental Health Treatment

Currently, twenty-one death-row inmates are receiving outpatient mental health treatment and five inmates are receiving either moderate or intensive inpatient mental health treatment.[30] Twenty-five inmates do not have any current mental health problem and the profile does not include the extent of mental health treatment for fifty inmates.[31]

II. THE STATUTORY EVOLUTION OF GEORGIA'S DEATH PENALTY SCHEME

A. Georgia's Post-Furman Death Penalty Scheme

In 1973, after the United States Supreme Court, in *Furman v. Georgia*,[32] found that the death penalty as practiced violated the Eighth and Fourteenth Amendments of the United

---

[20] *Id.* at 67-68.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 37.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 38.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 44.
[31] *Id.*
[32] 408 U.S. 238 (1972). Two of the petitioners in this case were convicted of offenses in the State of Georgia. *Id.* at 239. The first was convicted of murder and sentenced to death pursuant to section 26-1005 of the Georgia Code Annotated and the other was convicted of rape and sentenced to death pursuant to section 26-1302 of the Georgia Code Annotated. *Id.*

States Constitution, the Georgia Legislature adopted a new law allowing for the imposition of the death penalty for certain offenses and providing for specific procedures for death penalty cases.[33] The new law altered Georgia's death penalty scheme by amending sections 26-2401,[34] 26-3102, 27-2401,[35] 27-2534, 27-2514,[36] and 27-2528 of the Georgia Code Annotated, and adding sections 27-2534.1 and 27-2537.[37]

Under the revised death penalty scheme, Georgia retained the death penalty for the offenses of aircraft hijacking,[38] treason,[39] murder,[40] rape,[41] armed robbery,[42] and kidnapping for ransom or where the victim is harmed.[43] Upon conviction of one of these offenses, the court held a separate hearing to determine whether to sentence the defendant to death, life imprisonment, or a lesser punishment.[44]

During the punishment hearing, the judge and jury, depending upon whether the defendant pleaded guilty or waived his/her right to a jury trial,[45] heard arguments from the defendant or his/her counsel and the state regarding the appropriate punishment.[46] Additionally, the defendant or his/her counsel and the state were authorized to present "evidence in extenuation, mitigation, and aggravation of punishment."[47] However, "only such evidence in aggravation . . . [that] the state . . . ha[d] made known to the defendant prior to his[/her] trial . . . [was] admissible."[48]

The statutory aggravating circumstances included:

1. the offense of murder, rape, armed robbery, or kidnapping was committed by a

---

[33] 1973 Ga. Laws 74.

[34] Section 26-2401 of the Georgia Code Annotated, pertaining to the prohibition of perjury, will not be discussed, because in 1973, the Georgia Legislature made perjury no longer punishable by death. *See* 1973 Ga. Laws 74, § 2. Instead, the legislature made perjury punishable by "a fine of not more than $1,000 or by imprisonment for not less than one nor more than 10 years, or by both." *Id.*

[35] Section 27-2401 of the Georgia Code Annotated, pertaining to the preparation of the trial transcript, is outside the scope of our discussion and will not be discussed at any length. *See* 1973 Ga. Laws 74, § 6.

[36] Section 27-2514 of the Georgia Code Annotated deals with the time and mode of conveying the prisoner to the penitentiary, which is outside the scope of our discussion and will not be discussed at any length. *See* 1973 Ga. Laws 74, § 9.

[37] 1973 Ga. Laws 74, §§ 1 (referencing GA. CODE ANN. § 27-2534), 3 (referencing GA. CODE ANN. § 27-2534.1), 4 (referencing GA. CODE ANN. § 27-2537), 7 (referencing GA. CODE ANN. § 26-3102), 8 (referencing GA. CODE ANN. § 27-2528).

[38] *See* GA. CODE ANN. §§ 26-3301, 27-2534.1 (1973).

[39] *See* GA. CODE ANN. §§ 26-2201, 27-2534.1 (1973).

[40] *See* GA. CODE ANN. §§ 26-1101, 27-2534.1 (1973).

[41] *See* GA. CODE ANN. §§ 26-2001, 27-2534.1 (1973).

[42] *See* GA. CODE ANN. §§ 26-1902, 27-2534.1 (1973).

[43] *See* GA. CODE ANN. §§ 26-1311, 27-2534.1 (1973).

[44] 1973 Ga. Laws 74, § 1 (referencing GA. CODE ANN. § 27-2534 (1973)).

[45] 1973 Ga. Laws 74, § 8 (referencing GA. CODE ANN. § 27-2528 (1973)).

[46] 1973 Ga. Laws 74, § 1 (referencing GA. CODE ANN. § 27-2534 (1973)).

[47] *Id.*

[48] *Id.*

person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;

2. the offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;
3. the offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
4. the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
5. the murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty;
6. the offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
7. the offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
8. the offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;
9. the offense of murder was committed by a person in, or who has escaped from, the lawful custody in a place of lawful confinement; and
10. the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.[49]

Following the presentation of evidence, the judge charged the jury orally and in writing to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by the law and any of the [aforementioned] statutory aggravating circumstances."[50] For all offenses where the death penalty was a statutorily authorized punishment, except aircraft hijacking and treason, the jury was required to find at least one statutory aggravating circumstance beyond a reasonable doubt in order to impose a sentence of death.[51] In addition to finding at least one statutory aggravating circumstance, the jury also had to affirmatively elect to sentence the defendant to death by recommending such sentence to the court.[52]

---

[49] 1973 Ga. Laws 74, § 3 (referencing GA. CODE ANN. § 27-2534.1 (1973)).
[50] *Id.*
[51] *Id.*
[52] *Id.*

If the jury recommended a sentence of death, it had to identify in writing the aggravating circumstance(s) found beyond a reasonable doubt.[53] The judge was bound by the jury's recommended sentence.[54] However, if the defendant pleaded guilty or waived a jury trial, the judge had to determine the appropriate sentence.[55] If the sentence was death, the judge had to identify in writing the aggravating circumstance(s) found beyond a reasonable doubt.[56]

In all cases in which a sentence of death was imposed, the Georgia Supreme Court reviewed the punishment.[57] When doing so, the Court was charged with determining the following:

1. whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
2. whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and
3. whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[58]

In addition to the Georgia Supreme Court's automatic review of the death sentence, a defendant could file a direct appeal with the court challenging the guilty verdict as well as the death sentence.[59] If a defendant filed a direct appeal, the Georgia Supreme Court consolidated the appeal with its review of the punishment and considered the legal errors enumerated in the appeal, the sufficiency of the evidence to support the verdict, and the validity of the sentence.[60]

B. Constitutionality of Georgia's 1973 Death Penalty Scheme: Gregg v. Georgia

In 1976, the United States Supreme Court, in *Gregg v. Georgia*,[61] assessed the constitutionality of Georgia's 1973 death penalty scheme.[62] The Court found that Georgia's new death penalty procedures addressed the concerns articulated in *Furman v. Georgia*.[63] Specifically, it found that the new procedures protected against the arbitrary and capricious application of the death penalty by requiring a finding of at least one aggravating circumstance before the death penalty could be imposed and by requiring the

---

53 *Id.*
54 1973 Ga. Laws 74, § 7 (referencing GA. CODE ANN. § 26-3102 (1973)).
55 1973 Ga. Laws 74, § 3 (referencing GA. CODE ANN. § 27-2534.1(c) (1973)).
56 *Id.*
57 1973 Ga. Laws 74, § 4 (referencing GA. CODE ANN. § 27-2537 (1973)).
58 *Id.*
59 1973 Ga. Laws 74, § 4 (referencing GA. CODE ANN. § 27-2537(i) (1973)).
60 *Id.*
61 428 U.S. 153 (1976).
62 *Id.* at 207.
63 *Id.* at 206-07; Furman v. Georgia, 408 U.S. 238 (1972).

Georgia Supreme Court to review the proportionality of all death sentences.[64] Given these safeguards, the Court upheld the constitutionality of Georgia's 1973 death penalty scheme.[65]

C. Constitutionality of Imposing Death for Non-Murder Cases

In a series of cases beginning in 1974 with *Gregg v. State*,[66] the Georgia Supreme Court considered whether the offense of armed robbery warranted the imposition of the death penalty.[67] In these cases, the Court reversed the defendants' death sentences for armed robbery, reasoning that because the death penalty is rarely imposed for that offense, the death penalty is excessive and disproportionate to the sentences imposed in similar cases.[68]

Three years later, on June 29, 1977, the United States Supreme Court, in *Coker v. Georgia*,[69] held the imposition of the death penalty for the crime of rape to be cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.[70] The Court reasoned that because rape does not involve the taking of a life, death is a "grossly disproportionate and excessive punishment."[71] In support of its decision, the Court noted that the nation largely had rejected death as an acceptable punishment for rape alone, as evidenced by the lack of state statutes prescribing death for rape and Georgia juries' reluctance to sentence convicted rapists to death.[72]

On the same day the Court issued its decision in *Coker*, it reversed the imposition of the death penalty for the offenses of rape and kidnapping with bodily injury in *Eberheart v. Georgia*.[73] The Court stated that in light of *Coker*, the imposition of the death penalty for the offenses of rape and kidnapping with bodily injury also constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.[74]

---

[64] *Gregg*, 428 U.S. at 206-08.
[65] *Id.* at 207.
[66] 210 S.E.2d 659, 667 (Ga. 1974). *Gregg* was appealed to the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). Because the Georgia Supreme Court vacated the death sentences for armed robbery, the United States Supreme Court did not assess the constitutionality of imposing the death penalty for an offense that did not take a life, such as armed robbery, rape, or kidnapping. *See Gregg*, 428 U.S. at 187.
[67] *Gregg*, 210 S.E.2d at 667; Floyd v. State, 210 S.E.2d 810, 814 (Ga. 1974); Jarrell v. State, 216 S.E.2d 258, 270 (Ga. 1975).
[68] *Gregg*, 210 S.E.2d at 667; *Floyd*, 210 S.E.2d at 814; *Jarrell*, 216 S.E.2d at 270; *see* Dorsey v. State, 225 S.E.2d 418, 421 (Ga. 1976) (finding that because the death penalty cannot be imposed for armed robbery, there was no error in failing to death qualify the jury).
[69] 433 U.S. 584 (1977).
[70] *Id.* at 591.
[71] *Id.* at 598-99.
[72] *Id.* at 596-97.
[73] 433 U.S. 917 (1977).
[74] *Id.* at 917.

Shortly thereafter, in July 1977, the Georgia Supreme Court, in *Collins v. State*,[75] applied the rationale of *Coker* to the offenses of armed robbery and kidnapping[76] and found that the death penalty may not be imposed for these offenses.[77]

D. Amendments to Georgia's 1973 Death Penalty Scheme

1. 1974 Amendments

In 1974, the Georgia Legislature repealed section 27-2534 of the Georgia Code Annotated, setting forth the procedures for determining the defendant's sentence, and replaced it with section 27-2503, which mirrored section 27-2534, except that it required the judge to impose the sentence in all felony cases other than those in which the death penalty is sought.[78]

2. 1980 Amendments

In 1980, the Georgia Legislature adopted a new statute, section 27-2538 of the Georgia Code Annotated, requiring the Georgia Supreme Court to establish rules for a unified review procedure, mandating the presentation of all possible challenges to the conviction, sentence, and detention of defendants sentenced to death without limiting or restricting the remedies available through the writ of habeas corpus.[79] The new statute also called upon the Georgia Supreme Court to establish checklists for the trial court, prosecutor, and defense counsel to be used prior to, during, and after the trial of a death penalty case to ensure the defense raised or waived all possible claims.[80]

Pursuant to the legislature's request, the Georgia Supreme Court adopted the Uniform Appeal Procedure—containing the "Unified Appeal Outline of Proceedings" and the "Checklist of Unified Appeal"—on August 15, 1980 and declared that it would be applicable to all cases in which the death penalty was sought after August 25, 1980.[81]

3. Georgia Code Recodified

---

[75] 236 S.E.2d 759 (Ga. 1977).

[76] Although kidnapping for ransom or with bodily injury are no longer punishable by death, when an individual is killed during the commission of such offense, it is punishable by death. *See* Sears v. State, 514 S.E.2d 426, 434 (Ga. 1999); Stanley v. State, 241 S.E.2d 173, 180 (Ga. 1977).

[77] *Collins*, 236 S.E.2d at 760-61.

[78] 1974 Ga. Laws 854, § 7 (referencing GA. CODE ANN. § 27-2503 (1974)).

[79] 1980 Ga. Laws 872, § 1 (referencing GA. CODE ANN. § 27-2538 (1980)).

[80] *Id.* (referencing GA. CODE ANN. § 27-2538(b) (1980)).

[81] *See* Marion T. Pope, Jr., *A Study of the Unified Appeal Procedure in Georgia*, 23 GA. L. REV. 185, 193-94 (1988).

On November 1, 1982, the Georgia Legislature repealed Georgia's 1933 code[82] to recodify, revise, modernize, and reenact the laws of Georgia as the Official Code of Georgia Annotated (O.C.G.A.).[83] Under the new code, the following statutes were renumbered as follows:

1. Ga. Code Ann. § 26-3102 became O.C.G.A. § 17-10-31;
2. Ga. Code Ann. § 27-2503 [formerly § 27-2534] became O.C.G.A. § 17-10-2;
3. Ga. Code Ann. § 27-2528 became O.C.G.A. § 17-10-32;
4. Ga. Code Ann. § 27-2534.1 became O.C.G.A. § 17-10-30;
5. Ga. Code Ann. § 27-2537 became O.C.G.A. § 17-10-35 and § 17-10-37; and
6. Ga. Code Ann. § 27-2538 became O.C.G.A. § 17-10-36.

4. 1988 Amendments

In 1988, the Georgia Legislature amended section 17-10-36 of the O.C.G.A. and adopted two new statutes, sections 17-10-35.1 and 17-10-35.2.[84]

The amendment to section 17-10-36 expanded the application of the unified review procedure in three ways.[85] First, it allowed for challenges to trial proceedings, as well as to the defendant's conviction, sentence, and detention.[86] Second, it applied the procedures to defendants who may be sentenced to death in addition to those who have been sentenced to death.[87] Lastly, it made the unified review procedure applicable to both pretrial and post-trial appellate review.[88]

The two new statutes, sections 17-10-35.1 and 17-10-35.2, created a procedure by which the Georgia Supreme Court can review pretrial proceedings in cases in which the death penalty is sought.[89] Section 17-10-35.1 allows the trial judge to initiate review of pretrial proceedings by filing a report certifying that all pretrial proceedings in the case have been completed and that the case is ready for trial.[90] In addition to filing the report, the trial

---

[82] O.C.G.A. §§ 1-1-9, -10 (1982).
[83] O.C.G.A. § 1-1-2 (1982).
[84] 1988 Ga. Laws 1364, §§ 4, 5 (referencing O.C.G.A. §§ 17-10-36, -35.1, -35.2 (1988)); *see also* O.C.G.A. § 17-7-131(a)(3), (c)(3), (j) (2004). In 1988, the Georgia Legislature also amended section 17-7-131 of the O.C.G.A. by adding three new provisions, which (1) required the resolution of the issue of mental retardation during the guilt/innocence phase of a capital trial, (2) prohibited the imposition of the death penalty against all defendants found "guilty but mentally retarded," and (3) provided for the imposition of life imprisonment for defendants found "guilty but mentally retarded." *See* O.C.G.A. § 17-7-131(a)(3), (c)(3), (j) (2004). The amendments to section 17-7-131 are discussed at length in Chapter Thirteen: Mental Retardation, Mental Illness, and the Death Penalty of this report. *See infra*.
[85] 1988 Ga. Laws 1364, § 5 (referencing O.C.G.A. § 17-10-36 (1988)).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] 1988 Ga. Laws 1364, § 4 (referencing O.C.G.A. §§ 17-10-35.1, -35.2 (1988)).
[90] *Id.* (referencing O.C.G.A. § 17-10-35.1 (1988)).

judge must transmit the report to the state and the defendant.[91] Upon receipt of the trial judge's report, the state and the defendant may each file a report in the form of a questionnaire identifying areas of the pretrial proceedings where reversible error may have occurred.[92] The state and defendant may specifically address whether reversible error occurred with respect to any of the following:

1. any proceedings with respect to change of venue;
2. any proceedings with respect to recusal of the trial judge;
3. any challenge to the jury array;
4. any motion to suppress evidence;
5. any motion for psychiatric or other medical evaluation; and
6. any other matter deemed appropriate by the Georgia Supreme Court.[93]

The state and the defendant may also file an application for appeal, if applicable, which may be consolidated with their reports.[94] The reports and the appeal, if any, must then be transmitted to the Georgia Supreme Court.[95] Within twenty days of receiving the reports and appeal, if any, the Court must decide whether to grant review of the pretrial proceedings, or portions thereof, or deny review.[96] If the Court grants review, the parties must submit briefs and may present oral arguments, if ordered by the Court to do so.[97] Even if the Court denies review of a case or either party fails to assert its rights under section 17-10-35.1, the parties are not precluded from raising any issue during the post-trial review of their case that could have been raised under section 17-10-35.1.[98]

Although section 17-10-35.1 authorizes trial judges to initiate pretrial review, section 17-10-35.2 mandates that trial judges first conduct a hearing to determine whether review is necessary.[99] During the hearing, the state and defense may address whether the delay caused by the pretrial review outweighs the need for the review.[100] Unless the pretrial review would preclude justice from being served, the trial judge must order the review.[101] Orders to permit or deny a pretrial review are not appealable.[102]

5. <u>1993 Amendments</u>

---

[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] 1988 Ga. Laws 1364, § 4 (referencing O.C.G.A. § 17-10-35.1(c) (1988)).
[98] *Id.* (referencing O.C.G.A. § 17-10-35.1 (1988)).
[99] *Id.* (referencing O.C.G.A. § 17-10-35.2 (1988)).
[100] *Id.*
[101] *Id.*
[102] *Id.*

In 1993, the Georgia Legislature added three relevant statutes to Georgia's Death Penalty Scheme—sections 17-10-30.1, 17-10-31.1, and 17-10-32.1 of the O.C.G.A.

Sections 17-10-30.1 and 17-10-31.1 provide for the imposition of life without parole in any murder case in which the jury finds one or more statutory aggravating circumstances[103] and makes an affirmative recommendation of life without parole to the judge.[104] Section 17-10-31.1 allows the judge to instruct the jury as to the definition of "life without parole" and "life imprisonment."[105]

In cases in which a jury finds one or more statutory aggravating circumstances but recommends life without parole, section 17-10-31.1 mandates the imposition of a sentence of life without parole.[106] In cases in which a jury has unanimously found at least one statutory aggravating circumstance but is unable to reach a unanimous verdict as to sentence, section 17-10-31.1 requires the judge to dismiss the jury and impose a sentence of either life imprisonment, if it is a valid sentencing option, or life without parole.[107] The judge may sentence the defendant to life without parole only if s/he finds at least one aggravating circumstance beyond a reasonable doubt and is informed by the jury foreperson that upon the jury's last vote, a majority of the jurors voted for a sentence of death or life without parole.[108]

Section 17-10-31.2 requires a judge to sentence a defendant to life imprisonment if s/he pleads guilty to an offense for which death or life without parole may be imposed unless the state has given notice of its intention to seek the death penalty.[109] In cases in which the notice was given, section 17-10-31.2 permits the judge to sentence the defendant to death or life without parole only if the judge finds at least one statutory aggravating circumstance beyond a reasonable doubt.[110]

6. <u>1996 Amendment</u>

In 1996, the legislature revised the aggravating circumstance pertaining to the murder of a government official, section 17-10-30(b)(5) of the O.C.G.A., to read as follows:

> The murder of a judicial officer, former judicial officer, district attorney or solicitor-*general*, or former district attorney, solicitor, *or solicitor-general was committed* during or because of the exercise of his *or her* official duties. *(The additions made by the amendment are in italics.)*[111]

---

[103] 1993 Ga. Laws 569, § 4 (referencing O.C.G.A. § 17-10-30.1 (1993)).
[104] 1993 Ga. Laws 569, § 5 (referencing O.C.G.A. § 17-10-31.1 (1993)).
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] 1993 Ga. Laws 569, § 6 (referencing O.C.G.A. § 17-10-31.2 (1993)).
[110] *Id.*
[111] 1996 Ga. Laws 841, § 15 (referencing O.C.G.A. § 17-10-30(b)(5) (1996)).

7. 2002 Amendment

In 2002, the Georgia Legislature amended section 17-10-30(8) of the O.C.G.A. by replacing the word "fireman" with "firefighter."[112]

III. THE PROGRESSION OF A GEORGIA DEATH PENALTY CASE FROM ARREST TO EXECUTION

A. *Pre-trial Process*

1. Arrest, First Appearance, and Commitment Hearing ("Probable Cause" Hearing)

An individual arrested for the commission of a crime must be presented before a magistrate judge for his/her first appearance within forty-eight hours of arrest if arrested without a warrant,[113] or within seventy-two hours of arrest if arrested with a warrant.[114] During the first appearance, the judge must inform the accused of the charges and of his/her rights, including the right to remain silent; the right to a commitment hearing and the date and location of the commitment hearing, assuming the first appearance does not cover the commitment hearing issues and the defendant does not waive this right; the right to a grand jury indictment; and the right to counsel.[115] In addition to advising the accused of his/her right to counsel, the judge also must provide the accused with information about applying for appointed counsel.[116] Lastly, the judge must inform the accused of his/her right to waive these rights and plead guilty.[117]

If the accused pleads guilty at his/her first appearance or waives his/her right to a commitment hearing, the court will bind the case over to the superior court.[118] In the alternative, the accused will proceed to the commitment hearing,[119] at which time the state has the burden of proving that there is probable cause to believe that the accused is guilty of the offense(s) charged.[120] The accused may be represented during the hearing—

---

[112] 2002 Ga. Laws 787, § 4 (referencing O.C.G.A. § 17-10-30(8) (2002)); 2002 Ga. Laws 952, § 11 (referencing O.C.G.A. § 17-10-30(8) (2002)).

[113] O.C.G.A. § 17-4-62 (2004); GA. UNIF. SUPER. CT. R. 26.1.

[114] O.C.G.A. § 17-4-26 (2004); GA. UNIF. SUPER. CT. R. 26.1.

[115] O.C.G.A. § 17-4-26 (2004); GA. UNIF. SUPER. CT. R. 26.1.

[116] GA. UNIF. SUPER. CT. R. 26.1.

[117] *Id.*

[118] GA. UNIF. SUPER. CT. R. 26.2(A)(4); GA. CONST. art. VI, § 4, para. 1 (stating that the superior courts possess jurisdiction over all felony trials, except those involving juvenile offenders).

[119] A commitment hearing may be conducted by any of the following types of judges: state, superior, probate, magistrate as well as any officer of a municipality who has the criminal jurisdiction of a magistrate judge. *See* O.C.G.A. § 17-7-20 (2004).

[120] O.C.G.A. § 17-7-23(a) (2004); GA. UNIF. SUP. CT. R. 26.2(A)(5). *But see* State v. Middlebrooks, 222 S.E.2d 343, 345-46 (Ga. 1976) (holding that "[a] preliminary hearing is not a required step in a felony

although s/he does not have a right to appointed counsel until after s/he is indicted—and both the state and the accused will have the opportunity to present evidence.[121] If the judge finds that probable cause exists, s/he will bind the case over to the superior court.[122]

2. Grand Jury Indictment

Before the state can proceed with the prosecution of an individual accused of a capital felony, a grand jury[123] must return an indictment charging him/her with the offense.[124] A capital felony is any offense punishable by death at the time the Georgia Legislature reinstated the death penalty in 1973. The Georgia Code lists the following offenses as punishable by death: aircraft hijacking,[125] treason,[126] murder,[127] rape,[128] armed robbery,[129]

---

prosecution and that once an indictment is obtained there is no judicial oversight or review of the decision to prosecute because of any failure to hold a commitment hearing").

[121] GA. UNIF. SUPER. CT. R. 26.2(B)(2), (4).

[122] O.C.G.A. § 17-7-23(a) (2004); GA. UNIF. SUPER. CT. R. 26.2(A)(7).

[123] A grand jury must consist of between sixteen and twenty-three individuals. In order to return an indictment, at least twelve grand jurors must vote to do so. *See* O.C.G.A. § 15-12-61(a) (2004).

[124] O.C.G.A. §§ 17-7-50, -54 (2004). It should be noted that individuals accused of a felony offense other than capital felonies may be prosecuted with an accusation. *See* O.C.G.A. § 17-7-70 (2004).

[125] The crime of aircraft hijacking is prescribed at section 16-5-44 of the Official Code of Georgia Annotated (O.C.G.A.). Section 16-5-44 states as follows:

> (a) A person commits the offense of hijacking an aircraft when he (1) by use of force or (2) by intimidation by the use of threats or coercion places the pilot of an aircraft in fear of immediate serious bodily injury to himself or to another and causes the diverting of an aircraft from its intended destination to a destination dictated by such person.
> (b) The offense of hijacking is declared to be a continuing offense from the point of beginning, and jurisdiction to try a person accused of the offense of hijacking shall be in any county of this state over which the aircraft is operated.
> (c) A person convicted of the offense of hijacking an aircraft shall be punished by death or life imprisonment.

O.C.G.A. § 16-5-44 (2004).

[126] The crime of treason is codified at section 16-11-1 of the O.C.G.A., which states as follows:

> (a) A person owing allegiance to the state commits the offense of treason when he knowingly levies war against the state, adheres to her enemies, or gives them aid and comfort. No person shall be convicted of the offense of treason except on the testimony of two witnesses to the same overt act or on confession in open court. When the overt act of treason is committed outside this state, the person charged therewith may be tried in any county in this state.
> (b) A person convicted of the offense of treason shall be punished by death or by imprisonment for life or for not less than 15 years.

O.C.G.A. § 16-11-1 (2004).

[127] The crime of murder is codified at section 16-5-1 of the O.C.G.A. Section 16-5-1 states as follows:

> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
> (b) Express malice is that deliberate intention unlawfully to take the life of another human being which

and kidnapping for ransom or with bodily injury.[130] Both state and federal case law, however, have prohibited the imposition of the death penalty for the offenses of armed

---

is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.
(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.
(d) A person convicted of the offense of murder shall be punished by death or by imprisonment for life.

O.C.G.A. § 16-5-1 (2004).

[128] Georgia's rape statute, section 16-6-1 of the O.C.G.A., states as follows:

(a) A person commits the offense of rape when he has carnal knowledge of:
(1) A female forcibly and against her will; or
(2) A female who is less than ten years of age.

Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.
(b) A person convicted of the offense of rape shall be punished by death, by imprisonment for life without parole, by imprisonment for life, or by imprisonment for not less than ten nor more than 20 years. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.
(c) When evidence relating to an allegation of rape is collected in the course of a medical examination of the person who is the victim of the alleged crime, the law enforcement agency investigating the alleged crime shall be responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence.

O.C.G.A. § 16-6-1 (2004).

[129] Georgia's armed robbery statute, section 16-8-41 of the O.C.G.A., in pertinent part, states as follows:

(a) A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.
(b) A person convicted of the offense of armed robbery shall be punished by death or imprisonment for life or by imprisonment for not less than ten nor more than 20 years.

O.C.G.A. § 16-8-41 (2004).

[130] Georgia's kidnapping statute, section 16-5-40 of the O.C.G.A., states as follows:

(a) A person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.
(b) A person convicted of the offense of kidnapping shall be punished by imprisonment for not less than ten nor more than 20 years, provided that a person convicted of the offense of kidnapping for ransom shall be punished by life imprisonment or by death and provided, further, that, if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

O.C.G.A. § 16-5-40 (2004).

robbery, rape, and kidnapping for ransom or with bodily injury where the victim is not killed.[131] Standing alone, the only offenses that are punishable by death are aircraft hijacking, treason, and murder.

a. Practical Implication of the Finding That Death May Not Be Imposed for Armed Robbery, Kidnapping, and Rape Where the Victim Is Not Killed

In addition to finding that the death penalty may not be imposed for the offenses of armed robbery,[132] kidnapping for ransom or with bodily injury,[133] and rape[134] where the victim is not killed, the Georgia Supreme Court also found that these offenses were no longer considered "capital felonies" for jurisdictional purposes.[135] As a result, the Georgia Court of Appeals, not the Georgia Supreme Court, has jurisdiction over appeals of convictions for armed robbery, kidnapping, and rape.[136]

Armed robbery, rape, and kidnapping for ransom and with bodily injury are still considered "capital felonies" in at least two contexts: (1) they are capital felonies within the meaning of that term when it is used to describe a statutory aggravating circumstance in the death penalty statute;[137] and (2) they are capital felonies within the meaning of that term as it is used in the speedy trial statutes.[138]

3. Appointment of Counsel

An individual indicted for a capital felony is eligible for appointed counsel[139] if s/he can establish that s/he is indigent.[140] The "Standards for Determining Indigence" adopted by the Georgia Public Defender Standards Council[141] pursuant to "The Georgia Indigent

---

[131] *See* Coker v. Georgia, 433 U.S. 584, 591 (1977); Eberheart v. Georgia, 433 U.S. 917 (1977); Collins v. State, 236 S.E.2d 759 (Ga. 1977); Jarrell v. State, 216 S.E.2d 258, 270 (Ga. 1975); Floyd v. State, 210 S.E.2d 810, 814 (Ga. 1974); Gregg v. State, 210 S.E.2d 659, 667 (Ga. 1974); Eberheart v. State, 206 S.E.2d 12 (Ga. 1974); *see also* Sears v. State, 514 S.E.2d 426 (Ga. 1999) (upholding a sentence of death for the offense of kidnapping with bodily injury where the victim was killed); Moore v. State, 243 S.E.2d 1, 11 (Ga. 1978) (upholding a sentence of death for the offense of rape where the victim was raped and then killed); Stanley v. State, 241 S.E.2d 173 (Ga. 1977) (upholding a sentence of death for the offense of kidnapping with bodily injury where the victim was killed).

[132] *See Gregg*, 210 S.E.2d at 667; *Floyd*, 210 S.E.2d at 814; *Jarrell*, 216 S.E.2d at 270.

[133] *See Eberheart*, 433 U.S. at 917.

[134] *Coker*, 433 U.S. at 593; *Eberheart*, 433 U.S. at 917.

[135] Harper v. State, 417 S.E.2d 435, 436-38 (Ga. Ct. App. 1992); *Collins*, 236 S.E.2d at 760-61.

[136] *Harper*, 417 S.E.2d at 436-38; *Collins*, 236 S.E.2d at 761.

[137] *See* Crawford v. State, 330 S.E.2d 567, 572 (Ga. 1985) (involving kidnapping); Peek v. State, 238 S.E.2d 12, 20 (Ga. 1977) (involving armed robbery); *Gregg*, 210 S.E.2d at 666-67.

[138] *See* Merrow v. State, 601 S.E.2d 428, 430 (Ga. 2004); Union v. State, 543 S.E.2d 683 (Ga. 2001); Day v. State, 453 S.E.2d 73 (Ga. Ct. App. 1994); Harper v. State, 417 S.E.2d 435 (Ga. Ct. App. 1992) (involving armed robbery); White v. State, 414 S.E.2d 296 (Ga. Ct. App. 1991) (involving armed robbery).

[139] GA. UNIFIED APPEAL R. II(A)(1) (stating that two attorneys must be appointed in all capital cases).

[140] *See* O.C.G.A. §§ 17-12-19.3, -121 (2005).

[141] The Council was established pursuant to the Indigent Defense Act with the specific mission to:

Defense Act of 2003"[142] (Indigent Defense Act) define an indigent as "a person who has been arrested or charged with a crime punishable by imprisonment who lacks sufficient income or other resources to employ a qualified lawyer to defend him or her without undue hardship on the individual or his or her dependents."[143]

If an individual indicted for a capital felony earns less than 200% of the Federal Poverty Guidelines and does not possess any other resources that could be used to employ an attorney without undue hardship, indigence is presumed and the individual is entitled to appointed counsel.[144] An individual who earns more than 200% but less than 300% of the Federal Poverty Guidelines is presumed to be ineligible for appointed counsel unless s/he can prove, "to the satisfaction of the Circuit Public Defender's Office" that either (1) s/he is unable to obtain qualified counsel due to the "extraordinary cost of the case, as compared to [his/her] disposable income or other reasonably available resources," or (2) "there are other reasons that make it impossible for the person to obtain qualified legal representation without undue hardship on the person or [his/her] dependants."[145] An individual denied appointed counsel may appeal the decision to the judge, or if no judge is assigned, to the court in which his/her case is pending.[146]

If an individual indicted for a capital felony is eligible for appointed counsel, s/he must be appointed two attorneys.[147] The attorneys must be appointed before the individual pleads to the charges, which generally occurs at the arraignment.[148]

4. Pre-Trial Conference: Notice of Intent to Seek the Death Penalty and Qualifications of Defense Counsel

---

> ensure, independently of political considerations or private interests, that each client whose cause has been entrusted to a circuit public defender receives zealous, adequate, effective, timely, and ethical legal representation, consistent with the guarantees of the Constitution of the State of Georgia, the Constitution of the United States and the mandates of the Georgia Indigent Defense Act of 2003; to provide all such legal services in a cost efficient manner; and to conduct that representation in such a way that the criminal justice system operates effectively to achieve justice.

See Georgia Public Defender Standards Council, Our Mission, *at* http://www.gidc.com/ (last visited on Aug. 16, 2005). It should be noted that the Indigent Defense Act applies only to indigent defendants tried after its effective date of January 1, 2005. *See* O.C.G.A. § 17-12-14 (2005).

[142] *See* 2003 Ga. Laws 32, § 1, eff. Dec. 31, 2003 (codified at O.C.G.A. §§ 17-12-1 through 17-12-13; §§ 17-12-19.1 through 17-12-19.14; §§ 17-12-20 through 17-12-37; §§ 17-12-40 through 17-12-45; §§ 17-12-80 through 17-12-88; §§ 17-12-101 through 17-12-108; and §§ 17-12-120 through 17-12-128).

[143] Georgia Public Defender Standards Council, Standards for Determining Indigence, *at* http://www.gidc.com/cpdsystem-standards-determining_indigence.pdf (last visited on Aug. 16, 2005).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] GA. UNIFIED APPEAL R. II(A)(I).

[148] GA. UNIF. SUPER. CT. R. 33.2(A).

In all cases in which the offense charged is a capital felony, a pre-trial conference must be held "[a]t the earliest possible opportunity after indictment and before arraignment."[149] The pre-trial conference must be recorded and transcribed.[150] At the pre-trial conference, the prosecuting attorney must announce whether s/he intends to seek the death penalty.[151] If s/he intends to seek the death penalty, s/he must file a notice of intent with the clerk of the superior court.[152] The superior court then transmits the notice to the clerk of the Supreme Court of Georgia.[153] If the prosecuting attorney does not seek the death penalty or seeks the death penalty and thereafter abandons such sentence, the "Unified Appeal Outline of Proceedings" and the "Unified Appeal Checklist," promulgated under the Unified Appeal Procedure, do not apply.[154]

Following the announcement of the state's intention to seek the death penalty, defense counsel must identify themselves and indicate whether they are retained or appointed.[155] If appointed, lead defense counsel must indicate whether s/he meets the following requirements:

1. s/he is a member in good standing of the State Bar or admitted to practice *pro hac vice*, and has at least five years criminal litigation experience as a defense attorney or a prosecuting attorney;
2. s/he has been lead counsel on at least one death-penalty murder trial to verdict or three capital (non-death penalty) trials to verdict, one of which was a murder case, or has been co-counsel on two death penalty cases;
3. s/he is familiar with the unified appeal procedures;
4. s/he is familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence;
5. s/he has attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death-penalty defense, or upon appointment will agree to take ten hours of training or educational programs and maintain annually during the pendency of the case ten hours of training or educational programs; and
6. s/he has demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.[156]

Similarly, co-counsel must indicate whether s/he meets the following requirements:

1. s/he is a member in good standing of the State Bar with combined three years criminal trial experience either as a criminal defense attorney or prosecuting

---

[149] GA. UNIFIED APPEAL R. II(C).
[150] *Id.*
[151] GA. UNIFIED APPEAL R. II(C)(1).
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] GA. UNIFIED APPEAL R. II(C)(2).
[156] GA. UNIFIED APPEAL R. II(A)(1)(a).

attorney;

2. s/he has been lead or co-counsel in at least one (non-death penalty) murder trial to verdict or in at least two felony jury trials; and
3. s/he has attended within twelve months previous to appointment at least ten hours of specialized training or educational programs in death-penalty defense, or upon appointment will agree to take ten hours of training or educational programs and maintain annually during the pendency of the case 10 hours of training or education programs. This requirement may be met by viewing video-tape instruction and written materials and certifying to the trial court that the materials have been reviewed.[157]

If either lead or co-counsel does not meet the requisite qualifications but the superior court judge finds the attorney otherwise qualified, the judge may petition the Georgia Supreme Court for authorization to appoint the attorney.[158]

In addition to confirming the qualifications of defense counsel, the judge also must give the defendant the opportunity to raise any objections to defense counsel or to the manner in which defense counsel have conducted or are conducting his/her defense.[159] Furthermore, the judge must: (1) provide the defendant, defense counsel, and the prosecuting attorney with copies of the Unified Appeal Procedure; (2) remind defense counsel of defendant's option to participate in reciprocal discovery;[160] (3) determine whether the defendant intends to challenge the arrays of the grand and traverse juries; (4) review the jury lists to assess whether all of the cognizable groups in that county are fairly represented, regardless of whether a challenge was raised; (5) review Section I of the Unified Appeal Checklist with the state and defense counsel; (6) determine which pre-trial issues the defendant intends to raise and remind him/her that issues not raised may be waived; (7) establish hearing dates for any pre-trial issues the defendant wishes to raise; and (8) instruct defense counsel to locate and interview all persons whose testimony might be helpful for purposes of defense or mitigation of punishment.[161] Lastly, the judge must schedule the arraignment.[162]

5. <u>Arraignment, Pleas, Special Plea of Mental Incompetency to Stand Trial, and Notice of the Defense's Intention to Raise the Issue of Insanity or Mental Illness</u>

---

[157] GA. UNIFIED APPEAL R. II(A)(1)(b).
[158] GA. UNIFIED APPEAL R. II(A)(3).
[159] GA. UNIFIED APPEAL R. II(C)(7).
[160] GA. UNIFIED APPEAL R. II(C)(4); O.C.G.A. § 17-16-4 (2005); O.C.G.A. § 17-16-2(e) (2005) (stating that if the defendant elects to have the reciprocal discovery process apply to his/her death penalty trial, then such process also applies to the sentencing phase of the death penalty trial).
[161] GA. UNIFIED APPEAL R. II(C)(3)-(6), (8), (9).
[162] GA. UNIFIED APPEAL R. II(C)(10).

During the arraignment, the court must read the indictment and ask the defendant to plead to the capital felony and any lesser-included offenses charged.[163] The defendant may plead guilty, not guilty,[164] or mentally incompetent to stand trial.[165] A defendant indicted for a capital felony may not plead *nolo contendere*.[166]

If the defendant pleads guilty to a capital felony, the judge must assess the voluntariness of the plea, advise the defendant on various matters, and determine the accuracy of the plea before accepting it. To assess the voluntariness of the plea, the judge must determine whether the plea was a result of prior plea discussions and a plea agreement and, if it was, determine the terms of the agreement reached between the state and defense counsel.[167] The judge must also advise the defendant that the recommendations made by the state are not binding upon the judge and assess whether any other promises were made or any force or threats were used to obtain the plea.[168] The judge must then advise the defendant of the following: (1) the nature of the charges; (2) the rights waived upon entrance of a guilty plea; (3) the terms of the plea; (4) that the guilty plea may impact his/her immigration status, if s/he is not a United States citizen; and (5) the maximum possible sentence on the charge and the mandatory minimum sentence, if any.[169] Lastly, the judge must assess to his/her satisfaction the factual basis for the plea.[170] The judge may then accept the guilty plea and enter the sentence.

If no plea agreement is reached but the defendant pleads guilty to a capital felony and waives his/her right to a jury determination of his sentence, the judge must sentence the defendant to life imprisonment unless the state has filed a notice of intent to seek the death penalty.[171] In cases in which the state filed a notice of intent to seek the death penalty, the judge may sentence the defendant to life without parole or to death, if the judge finds beyond a reasonable doubt the existence of at least one aggravating circumstance in all cases except treason and aircraft hijacking, as such finding is unnecessary for those offenses.[172]

---

[163] O.C.G.A. § 17-7-93(a) (2004).

[164] If the defendant stands silent and does not plead guilty or not guilty, the court will enter a plea of not guilty. *See* O.C.G.A. § 17-7-94 (2004). Additionally, a plea of not guilty has been held to encompass the defense of not guilty by reason of insanity. *See* Gilbert v. State, 220 S.E.2d 262 (Ga. 1975); Abrams v. State, 154 S.E.2d 443 (Ga. 1967); Gilder v. State, 133 S.E.2d 861 (Ga. 1967); Hubbard v. State, 28 S.E.2d 115 (Ga. 1943); Hankinson v. State, 200 S.E.2d 315 (Ga. Ct. App. 1973).

[165] O.C.G.A. §§ 17-7-93(a), -130(a) (2004).

[166] O.C.G.A. § 17-7-95(a) (2004).

[167] GA. UNIF. SUPER. CT. R. 33.7; *see* GA. UNIF. SUPER. CT. R. 33.3 (prescribing the state's right to engage in plea negotiations with defense counsel and enter into plea agreements).

[168] GA. UNIF. SUPER. CT. R. 33.7.

[169] GA. UNIF. SUPER. CT. R. 33.8.

[170] GA. UNIF. SUPER. CT. R. 33.9.

[171] O.C.G.A. §§ 17-10-32, -32.1(b) (2004).

[172] O.C.G.A. § 17-10-32.1(b) (2004).

If the defendant pleads mentally incompetent to stand trial, s/he must do so in writing.[173] If the plea is not made during the arraignment, it must be filed with the court within ten days after the arraignment, unless the court extends the time for filing.[174] Once a plea of mentally incompetent to stand trial is entered, the court must impanel a special jury to assess the defendant's competency, which must be resolved before the defendant can stand trial for the offenses charged.[175] If the special jury finds the defendant mentally incompetent to stand trial, the defendant will be transferred into the custody of the Department of Human Resources (Department).[176]

Within ninety days of the defendant's transfer, the Department must evaluate whether the defendant is "presently mentally incompetent to stand trial" and if so, whether there is a "substantial probability that the [defendant] will attain mental competency to stand trial in the foreseeable future."[177] If the defendant is found to be mentally competent to stand trial, s/he must be returned to the custody of the court for prosecution.[178]

If the defendant is found to be mentally incompetent to stand trial and there is not a substantial probability that s/he will attain mental competency in the foreseeable future, the defendant must be returned to the custody of the court.[179] The court will then conduct a hearing to determine whether the defendant qualifies for involuntary civil commitment.[180] If s/he does not qualify for civil commitment, the defendant must be released subject to the provisions of bond and any other conditions set by the court.[181]

If the defendant is found to be mentally incompetent to stand trial and there is a substantial probability that the person will attain competency in the foreseeable future, the Department must retain custody of the defendant for purposes of treatment for an additional period of time not to exceed nine months.[182] If after nine months the defendant is still not competent to stand trial, the defendant should be civilly committed if s/he qualifies; and if not, the defendant should be returned to the custody of the court and released subject to the provisions of bond and any other conditions set by the court.[183]

If the defendant does not plead mentally incompetent to stand trial but intends to raise the issue of insanity, mental illness, mental retardation, or mental incompetence at the time of the crime or at the time of trial, the defendant must file a "Notice of Intent of Defense to

---

[173] O.C.G.A. § 17-7-111 (2004).
[174] O.C.G.A. § 17-7-110 (2004); GA. UNIF. SUPER. CT. R. 31.1.
[175] O.C.G.A. § 17-7-130(a) (2004).
[176] *Id.*
[177] O.C.G.A. § 17-7-130(b) (2004).
[178] *Id.*
[179] O.C.G.A. § 17-7-130(b), (e)(2) (2004).
[180] O.C.G.A. § 17-7-130(e)(2) (2004).
[181] *Id.*
[182] O.C.G.A. § 17-7-130(d) (2004).
[183] *Id.*

Raise Issue of Insanity, Mental Incompetence or Mental Retardation."[184] The notice must be filed at least ten days before the trial, unless the court adjusts the deadline.[185] If the defendant raises the defense of insanity at the time of the crime, the court must appoint at least one psychiatrist or licensed psychologist to examine the defendant and testify at trial.[186]

If the defendant pleads not guilty, the court must set an appropriate time for a motion hearing.

6. Motion Hearing

At the motion hearing, the court must hear all previously filed motions.[187] Additionally, the court, the state, and defense counsel must review Section I of the Unified Appeal Checklist to determine whether there are any pre-trial issues that have not been raised.[188] The court must also remind defense counsel to present evidence during both stages of the capital trial—the guilt/innocence phase and the sentencing phase.[189] Lastly, the court must provide the defendant with an opportunity to state any objections to his/her defense counsel or to the manner in which defense counsel have conducted or are conducting his/her defense.[190]

7. Selection of a Capital Jury

To facilitate the selection of a capital jury, the court must impanel forty-two[191] prospective jurors from which the state and defense must select a total of twelve jurors[192] and one or more alternative jurors, if deemed necessary by the judge.[193] If after striking prospective jurors from the panel there are fewer than twelve qualified jurors, the presiding judge must "summon such numbers of persons who are competent jurors as may be necessary to provide a full panel."[194]

In selecting the jury, the judge must ask the prospective jurors the "usual *voir dire* questions."[195] The "usual *voir dire* questions" include the following:

---

[184] GA. UNIF. SUPER. CT. R. 31.4.
[185] GA. UNIF. SUPER. CT. R. 31.1.
[186] O.C.G.A. § 17-7-130.1 (2004).
[187] GA. UNIFIED APPEAL R. II(D)(1); GA. UNIF. SUPER. CT. R. 31.2.
[188] GA. UNIFIED APPEAL R. II(D)(2).
[189] GA. UNIFIED APPEAL R. II(D)(3).
[190] GA. UNIFIED APPEAL R. II(D)(4).
[191] In cases in which the death penalty is not sought, the court is required to impanel only 30 potential jurors. *See* O.C.G.A. § 15-12-160 (2004).
[192] O.C.G.A. § 15-12-160 (2004).
[193] O.C.G.A. § 15-12-168 (2004).
[194] O.C.G.A. § 15-12-160 (2004).
[195] O.C.G.A. § 15-12-133 (2004); *see also* Jordan v. State, 276 S.E.2d 224, 234 (Ga. 1981).

1. Have you, for any reason, formed and expressed any opinion in regard to the guilt or innocence of the accused?
2. Have you any prejudice or bias resting on your mind either for or against the accused?
3. Is your mind perfectly impartial between the state and the accused?
4. Are you conscientiously opposed to capital punishment?[196] ("*Witherspoon* question").[197]

All questions pertaining to the prospective jurors' opposition to ("*Witherspoon* questions") and support of ("reverse-*Witherspoon* questions")[198] the death penalty must be addressed to each prospective juror individually.[199] Before ruling on any motion to strike under *Witherspoon*, the judge must consult with the state and defense as to whether there are any additional inquiries.[200]

The defense and state may each peremptorily challenge fifteen jurors.[201] See the Jury Section for a detailed discussion on the *voir dire* process.

Once the jury is impaneled, the case proceeds to a pre-trial review hearing.

B. Pre-Trial Review Hearing

Following the completion of all pre-trial proceedings, the court must conduct a hearing to assess whether interim appellate review (by the Georgia Supreme Court) of the pre-trial rulings is "appropriate," meaning that it would serve the "ends of justice in the case."[202] In deciding whether interim appellate review is appropriate, the court must hear from the state and defense on whether the delay caused by the interim appellate review outweighs

---

[196] O.C.G.A. § 15-12-164(a)(4) (2004); *see also* Curry v. State, 336 S.E.2d 762, 766 (Ga. 1985) (finding that the question "Are you conscientiously opposed to capital punishment?" is not so confusing as to render it unconstitutionally vague).

[197] *See* Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

[198] *See* Morgan v. Illinois, 504 U.S. 719 (1992). It should be noted that neither the Georgia Code nor the Uniform Superior Court Rules include pattern "reverse-*Witherspoon*" questions.

[199] GA. UNIF. SUPER. CT. R. 10.1; Miller v. State, 380 S.E.2d 690, 692 (Ga. 1989) (finding that the judge did not commit error by death-qualifying each juror); Cargill v. State, 340 S.E.2d 891, 901 (Ga. 1986); *Curry*, 336 S.E.2d at 767 (stating that trial judge has "exclusive responsibility for asking all *Witherspoon* and reverse-*Witherspoon* questions"). It is important to note that prior to the 1985 adoption of Uniform Superior Court Rule 10.1, courts were not required to address *Witherspoon* and reverse-*Witherspoon* questions to the prospective jurors individually. *See, e.g.*, Arnold v. State, 224 S.E.2d 386 (Ga. 1976) (finding "no error in propounding the Witherspoon and reverse-Witherspoon questions to the veniremen in a group").

[200] GA. UNIF. SUPER. CT. R. 10.1.

[201] O.C.G.A. § 15-12-165 (2005).

[202] O.C.G.A. §§ 17-10-35.2, 5-6-34(c) (2004); GA. UNIFIED APPEAL R. II(F)(1).

the need for the review.[203] If the court finds that interim appellate review is inappropriate, the court should enter an order to that effect and declare the case ready for trial.[204] An order denying pre-trial review is not appealable.[205]

On the other hand, if the court finds that interim appellate review is appropriate, it must order the review and file with the clerk of the superior court and deliver to the parties a report in the form of a questionnaire certifying that all pre-trial proceedings have been completed.[206] The report must also indicate whether there is "arguably any reversible error" with reference to:

1. any proceedings with respect to change of venue;
2. any proceedings with respect to recusal of the trial judge;
3. any challenge to the jury array;
4. any motion to suppress evidence;
5. any motion to exclude statements by the defendant;
6. any motion for psychiatric or other mental or physical evaluation;
7. any motion for additional legal, investigative, or expert assistance;
8. any other pre-trial matter which may arguably result in reversible error; and
9. any other matter deemed appropriate by the Georgia Supreme Court.[207]

Additionally, if the judge finds that there is "arguably reversible error" with reference to any *ex parte* proceedings, s/he must highlight the incident in his/her report in a manner that does not disclose the *ex parte* communications.[208]

Within ten days after the filing of the court's report or the receipt of the transcript of the proceedings, whichever is later, both parties may file with the clerk of the superior court and serve upon the opposing party a report in the form of a questionnaire identifying whether reversible error arguably occurred with respect to any of the nine matters mentioned above.[209] In conjunction with the report, either party may file an application to appeal any order, decision, or judgment entered in the case.[210]

The application for an interlocutory appeal must be in the form of a petition and must identify the reason(s) for the review and the portions of the record relating to the issues for which review is sought.[211] The original appeal application must be filed with the

---

[203] O.C.G.A. § 17-10-35.2 (2004); GA. UNIFIED APPEAL R. II(F)(1).
[204] O.C.G.A. § 17-10-35.2 (2004); GA. UNIFIED APPEAL R. II(F)(1).
[205] O.C.G.A. § 17-10-35.2 (2004).
[206] O.C.G.A. § 17-10-35.1(a) (2004); GA. UNIFIED APPEAL R. II(F)(2).
[207] O.C.G.A. § 17-10-35.1(b) (2004); GA. UNIFIED APPEAL R. II(F)(2).
[208] GA. UNIFIED APPEAL R. II(F)(2)(i).
[209] O.C.G.A. § 17-10-35.1(a), (b) (2004); GA. UNIFIED APPEAL R. II(F)(3).
[210] O.C.G.A. § 17-10-35.1(a) (2004); GA. UNIFIED APPEAL R. II(F)(3).
[211] O.C.G.A. §§ 17-10-35.1(a); 5-6-34(b) (2004); GA. UNIFIED APPEAL R. II(F)(3).

clerk of the superior court.[212] The opposing party may not file a response.[213] The superior court clerk must transfer to the Georgia Supreme Court the trial judge's report, the transcript of the proceedings, the reports of the parties, and any application for appeal.[214]

Within twenty days after the case is docketed, the Georgia Supreme Court must issue an order granting review of the pre-trial proceedings, or portions thereof, or denying review entirely.[215] If the Court grants review of any part of the pre-trial proceedings, it must identify in its order the matters that will be reviewed, including but not limited to any matters highlighted in any of the reports or in the application for appeal.[216] The order must also establish the briefing schedule.[217] The Court may hear oral arguments or may render a decision on the record and the briefs.[218]

C. Capital Trial

Cases in which the state has filed a notice of intent to seek the death penalty are heard before the superior court[219] and are conducted in two phases: the guilt/innocence phase, and if the defendant is found guilty of a capital felony, the penalty phase. Immediately before the commencement of the guilt/innocence phase, the court must conduct a conference with the state, defense counsel, and the defendant for the following purposes:

1. the court must hear all remaining, pending motions;
2. the court must ascertain whether there are any last minute defense motions and give the state and defense counsel the opportunity to present any previously agreed upon stipulations;
3. the court must assess whether the parties have reviewed Part II(A) through (H) of the Unified Appeal Checklist and determine whether they are prepared to raise any trial issues in a timely manner;
4. the court must provide the defendant with the opportunity to raise any objections to his/her defense counsel or the manner in which defense counsel have been or are conducting his/her defense.[220]

---

[212] O.C.G.A. § 17-10-35.1(a) (2004). *But see* GA. UNIFIED APPEAL R. II(F)(3) (stating that the application for appeal should be filed with the clerk of the Georgia Supreme Court).

[213] O.C.G.A. § 17-10-35.1(a) (2004). *But see* GA. UNIFIED APPEAL R. II(F)(4) (stating that the opposing party may "file with the clerk of the Supreme Court an original response and seven copies").

[214] O.C.G.A. § 17-10-35.1(c) (2004). *But see* GA. UNIFIED APPEAL R. II(F)(4) (stating that the clerk of the superior court must "transmit to the Supreme Court the report of the trial judge and the portions of the record relevant to the issues to be addressed").

[215] O.C.G.A. § 17-10-35.1(d) (2004); GA. UNIFIED APPEAL R. II(H)(1).

[216] O.C.G.A. § 17-10-35.1(d) (2004); GA. UNIFIED APPEAL R. II(H)(1).

[217] O.C.G.A. § 17-10-35.1(d) (2004); GA. UNIFIED APPEAL R. II(H)(1).

[218] O.C.G.A. § 17-10-35.1(d) (2004); *see also* GA. UNIFIED APPEAL R. II(H)(1) (indicating that if either of the parties wish to present oral arguments, they must request to do so, and the court may grant oral arguments at its discretion).

[219] GA. CONST. art. VI, § 4, para. 1.

[220] GA. UNIFIED APPEAL R. III(A)(1).

Once the conference is completed, the court may proceed to the guilt/innocence phase.

1. Guilt/Innocence Phase

During the guilt/innocence phase, it is the jury's duty to assess the evidence presented to determine whether the state has proven that the defendant is guilty of a capital felony, as charged in the indictment, beyond a reasonable doubt.[221] The state and defense will present opening and closing arguments[222] as well as witnesses and other types of evidence.[223] After both sides have presented their evidence but before closing arguments, the court must hold a conference with the state, defense attorney, and the defendant for the following purposes:

1. any written requests to charge the jury must be presented for resolution;
2. the court must make a final ruling on any issues for which a tentative ruling or no ruling was made during the presentation of evidence;
3. the court must hear and the defense may make any timely or otherwise proper motions or objections and defense counsel must be given the opportunity to perfect the record by making a tender of proof as to any evidence that was excluded by the court;
4. the court must ascertain whether the parties have reviewed Part II(I) through (Q) of the Unified Appeal Checklist and are prepared to raise issues in a timely manner and advise defense counsel that objections to the state's closing argument will be waived unless raised as soon as the grounds for the objection arise, unless permission is granted to reserve objection until the conclusion of the argument; and
5. the court must give the defendant an opportunity to raise any objections s/he may have as to his/her defense counsel or to the manner in which the defense counsel have conducted or are conducting the defense.[224]

Following the conference, both parties will present closing arguments and the court subsequently will instruct the jury on the law that governs the case.[225] If, during the trial, the defendant claimed that s/he was insane or otherwise mentally incompetent at the time

---

[221] O.C.G.A. § 16-1-5 (2004) (stating that each element of the crime must be proven beyond a reasonable doubt); GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) §§ 100.00, 100.25 (3d ed. 2003).

[222] In capital cases, opening and closing arguments are limited to two hours for each side unless the court grants the state and/or defense additional time. *See* O.C.G.A. § 17-8-73 (2004); GA. UNIF. SUPER. CT. R. 13.1; *see also* O.C.G.A. § 17-8-74 (2004); GA. UNIF. SUPER. CT. R. 13.2 (referring to requests for extensions of time).

[223] O.C.G.A. §§ 17-8-73, -74 (2004); *see also* GA. UNIF. SUPER. CT. R. 10.2 (discussing the order of opening statements in criminal matters).

[224] GA. UNIFIED APPEAL R. III(A)(2).

[225] GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) §§ 100.00, 100.05 (3d ed. 2003).

of the crime, the judge must instruct the jury to consider the verdicts of "not guilty by reason of insanity at the time of the crime,"[226] "guilty but mentally ill at the time of the crime,"[227] and "guilty but mentally retarded"[228] in addition to "guilty" and "not guilty."[229]

If the defendant is found not guilty of the capital felony and all other charges, the court must acquit the defendant and release him/her from detention.[230] If the defendant is found guilty of the capital felony, the case proceeds to the second phase of a death penalty trial, the sentencing phase.

2. Sentencing Phase

The purpose of the sentencing phase is for the trial jury to determine whether the appropriate sentence for a defendant convicted of a capital felony is life imprisonment, life without parole, or death.[231] During the sentencing phase, both the state and defense counsel may make opening and closing arguments and may present witnesses and evidence regarding any statutory aggravating circumstances and any non-statutory aggravating or mitigating circumstances.[232]

The statutory aggravating circumstances are:

1. the offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;
2. the offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the

---

[226] O.C.G.A. §§ 17-7-131(c)(1), 16-3-2, 16-3-3 (2004); GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) §§ 209.00, 209.20 (3d ed. 2003). The court must instruct the jury as follows: "I charge that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law." *See* O.C.G.A. § 17-7-31(b)(3)(A) (2004).

[227] O.C.G.A. § 17-7-131(c)(2) (2004); GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) §§ 209.00, 209.30 (3d ed. 2003). The court must instruct the jury as follows: "I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant." *See* O.C.G.A. § 17-7-31(b)(3)(B) (2004).

[228] O.C.G.A. § 17-7-131(c)(3) (2004); GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) §§ 209.00, 209.40 (3d ed. 2003). The court must instruct the jury as follows: "I charge you that should you find the defendant guilty but mentally retarded, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant." *See* O.C.G.A. § 17-7-31(b)(3)(C) (2004).

[229] O.C.G.A. § 17-7-131(c) (2004); GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) § 209.00 (3d ed. 2003).

[230] O.C.G.A. § 17-9-1(a) (2004).

[231] O.C.G.A. § 17-10-16(a) (2004).

[232] O.C.G.A. § 17-10-30(b) (2004). *But see* Smith v. State, 510 S.E.2d 1, 10-11 (Ga. 1998) (noting that the trial court has the discretion to refuse to allow the parties to make opening statements at the beginning of the sentencing phase of a capital trial).

offender was engaged in the commission of burglary or arson in the first degree;

3. the offender, by his/her act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
4. the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
5. the murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his/her official duties;
6. the offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
7. the offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
8. the offense of murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his official duties;
9. the offence of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or
10. the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.[233]

Additionally, the state may present evidence illustrating the emotional impact of the crime on the victim, his/her family, and the community.[234] This evidence is commonly referred to as "victim impact evidence" and may include the testimony of an individual who possessed personal knowledge of the victim and was aware of the harm caused by the crime.[235] In his/her testimony, the witness may do any of the following:

1. describe the nature of the offense;
2. itemize any economic loss suffered by the victim or the family of the victim, if restitution is sought;
3. identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
4. describe any change in the victim's personal welfare or familial relationships as a result of the offense;
5. identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

---

[233] O.C.G.A. § 17-10-30 (2004).

[234] O.C.G.A. § 17-10-1.2(a)(1) (2004); *see* GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) § 303.30 (3d ed. 2003) (describing purpose of "victim impact evidence").

[235] O.C.G.A. § 17-10-1.2(a)(1) (2004).

6. discuss any other information related to the impact of the offense upon the victim, the victim's family, or the community.[236]

In response to the victim impact evidence, the defense may cross-examine the witnesses and introduce rebuttal evidence.[237]

After the presentation of evidence but before closing arguments, the court must hold a conference with the state, defense counsel, and the defendant for the following purposes:

1. any written requests to charge the jury must be presented to the court for rulings;
2. the court must make a final ruling as to any issues raised during the sentencing phase for which a tentative ruling or no ruling was made during the presentation of evidence;
3. the court must again review Part III of the Unified Appeal Checklist with the state and the defense counsel as well as hear any timely and otherwise proper motions or objections the defendant wishes to present and allow defense counsel to perfect the record by making a tender of proof as to any evidence that was excluded by the court—including potentially mitigating evidence;
4. the court must advise the defense counsel that any objections to the state's closing argument will be considered waived if not raised as soon as the grounds for objection arise—unless the court grants permission to reserve objection until the end of the argument; and
5. the court must provide the defendant with any opportunity to state any objections s/he may have to defense counsel or to the manner in which defense counsel have conducted and are conducting his/her defense.[238]

Following the conference, the parties may present their closing arguments. The court thereafter will instruct the jury orally and in writing to consider "all of the evidence received [] in court in both stages of the proceeding" and "facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment" when assessing the appropriate punishment for the defendant.[239]

Once the jury has been charged but before jury deliberations begin, the court must conduct a conference with the state, defense counsel, and the defendant for the following purposes:

1. the court must review Part III(C) and (D) of the Unified Appeal Checklist with the state and defense counsel and any issues as to state and defense arguments or as to the charge of the court must be presented and decided—

---

[236] O.C.G.A. § 17-10-1.2(b) (2004).
[237] O.C.G.A. § 17-10-1.2(c) (2004).
[238] GA. UNIFIED APPEAL R. III(B)(2).
[239] GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) § 303.20 (3d ed. 2003).

defense counsel must be advised that any such issues not timely raised are waived;

2. the court must review Part III(E) of the Unified Appeal Checklist with the state and defense counsel as well as advise defense counsel that any objections as to the form of the verdict must be raised when the verdict is returned and that a poll of the jurors is required; and
3. the court must provide the defendant an opportunity to raise any objections as to his/her defense counsel or to the manner in which defense counsel have conducted or are conducting the defense.[240]

Following the conference, the jury must deliberate to determine the appropriate sentence for the defendant. Apart from cases involving the offenses of aircraft hijacking or treason, in order to impose a sentence of death the jury must find, beyond a reasonable doubt, the existence of one or more statutory aggravating circumstances and it must recommend to the court a sentence of death.[241] Similarly, in order to impose a sentence of life without parole, the jury must find, beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance and it must recommend a sentence of life without parole to the court.[242] Moreover, the jury may sentence the defendant to life imprisonment for any reason or no reason at all, even if the jury finds, beyond a reasonable doubt, the existence of one or more aggravating circumstances.[243]

If the jury finds the existence of at least one statutory aggravating circumstance beyond a reasonable doubt and recommends to the court the sentence of either death or life without parole, the jury must identify in writing, signed by the jury foreperson, the aggravating circumstance(s) found beyond a reasonable doubt and the court must then enter the sentence recommended by the jury.[244]

If the jury finds one or more aggravating circumstances beyond a reasonable doubt but cannot reach a unanimous verdict as to the sentence, the judge must dismiss the jury and impose a sentence of either life imprisonment or life without parole.[245] The court may impose a sentence of life without parole only if the court finds beyond a reasonable doubt the existence of at least one aggravating circumstance and the court has been informed by the jury foreman that upon the jury's last vote, a majority of the jurors cast their vote for a sentence of death or for a sentence of life without parole.[246]

---

[240] GA. UNIFIED APPEAL R. III(B)(3).

[241] O.C.G.A. § 17-10-30(c) (2004). In cases involving the offense of aircraft hijacking or treason, a sentence of death may be imposed without a finding of one or more aggravating circumstances. *Id.*

[242] O.C.G.A. § 17-10-30.1(a) (2004).

[243] GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) § 303.40 (3d ed. 2003); *see also* O.C.G.A. § 17-9-3 (2004) (stating that the jury in all capital cases, except those involving murder, may find the defendant guilty but make a "recommendation for mercy" even if the jury found one or more aggravating circumstances).

[244] O.C.G.A. §§ 17-10-30(c), -31, -30.1(c), -31.1(b) (2004).

[245] O.C.G.A. § 17-10-31.1(c) (2004).

[246] *Id.*

In cases in which the defendant waived his/her right to a jury, the judge must determine the appropriate sentence.[247] The judge may impose a sentence of death only if s/he finds the existence of at least one aggravating circumstance, except in cases involving treason or aircraft hijacking where no aggravating circumstances are necessary to impose a sentence of death.[248] Similarly, the judge may impose a sentence of life without parole only if s/he finds one or more aggravating circumstances.[249] If the judge finds one or more aggravating circumstances and wishes to sentence the defendant to either death or life without parole, s/he must identify in writing the statutory aggravating circumstance found beyond a reasonable doubt and enter his/her judgment.[250]

Upon a judgment of death, the judge must state the sentence in writing[251] and direct that the defendant be "delivered to the Department of Corrections for execution of the death sentence."[252] Additionally, within forty-five days from the jury's verdict, the court reporter must file with the superior court a complete transcript of all phases of the case unless the reporter has obtained an extension from the judge.[253]

D. Motion for a New Trial, Direct Appeal, and Death Sentence Review by the Georgia Supreme Court

Following a conviction for a capital felony and a sentence of death, the defendant[254] may challenge his/her conviction and death sentence by: (1) filing a motion for a new trial with the superior court, and/or (2) filing a direct appeal with the Georgia Supreme Court.[255] If the defendant does not initiate any sort of review, the case will automatically be appealed to the Georgia Supreme Court within ten days of the filing of the trial transcript by the court reporter of the superior court.[256] This automatic review will occur even if the defendant does not wish to appeal his/her conviction or sentence.[257]

1. Motion for a New Trial

If the defendant decides to file a motion for a new trial,[258] s/he has the right to be represented by appointed or retained counsel while the motion is pending.[259] The

---

[247] O.C.G.A. §§ 17-10-30, -30.1(c) (2004).
[248] O.C.G.A. § 17-10-30(c) (2004).
[249] O.C.G.A. § 17-10-30.1(c) (2004).
[250] O.C.G.A. §§ 17-10-30, -30.1(c) (2004).
[251] O.C.G.A. § 17-10-33 (2004).
[252] O.C.G.A. § 17-10-38(b) (2004).
[253] GA. UNIFIED APPEAL R. IV(A)(1).
[254] For purposes of clarity, we have continued to use the term "defendant" throughout the direct appeal/death penalty review section.
[255] GA. UNIFIED APPEAL R. IV(A)(1)(a); O.C.G.A. § 17-10-35 (2004).
[256] GA. UNIFIED APPEAL R. IV(A)(3)(a)(1); O.C.G.A. § 17-10-35 (2004).
[257] GA. UNIFIED APPEAL R. IV(A)(1)(a).
[258] O.C.G.A. § 5-5-42(d) (2004) (illustrating the form for a "Motion for a New Trial").
[259] UNIFIED APPEAL R. IV(A)(2)(d) (2004).

defendant may raise any issue in his/her motion but must file the motion within thirty days of the entry of judgment.[260] The court will not accept untimely motions, including those seeking performance of DNA testing,[261] unless the defendant establishes "good cause" for the delay.[262] Similarly, successive motions relating to the same verdict or judgment will not be accepted except in "extraordinary circumstances."[263]

Once the defendant has filed the motion for a new trial, the court must hear the motion "as promptly as possible."[264] The hearing on the motion is not limited to the issues raised in the motion.[265]

The court may grant a motion for a new trial for any of the following reasons:

1. the jury's verdict is found to be contrary to the evidence and to the principles of justice and equity;[266]
2. the jury's verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding;[267]
3. material evidence was illegally admitted or illegally withheld from the jury over the objection of the defendant;[268]
4. newly-discovered material evidence was uncovered after the verdict against the defendant and brought to the attention of the court within thirty days after the entry of the judgment; and [269]
5. any other non-statutory ground articulated in the motion that s/he believes warrants a new trial.[270]

Additionally, the court may grant a new trial upon its own motion within thirty days of the entry of the judgment.[271]

If the court grants the motion, a new trial must be scheduled as if it were the original trial.[272] If the motion is denied, the defendant may appeal the denial of the motion or file a direct appeal of his/her conviction and sentence with the Georgia Supreme Court.[273]

---

[260] O.C.G.A. § 5-5-40(a), (d) (2004).
[261] O.C.G.A. § 5-5-41(c) (2004).
[262] O.C.G.A. § 5-5-41(a) (2004).
[263] O.C.G.A. § 5-5-41(b) (2004).
[264] GA. UNIF. SUPER. CT. R. 41.1.
[265] GA. UNIFIED APPEAL R. IV(A)(2)(c).
[266] O.C.G.A. § 5-5-20 (2004).
[267] O.C.G.A. § 5-5-21 (2004).
[268] O.C.G.A. § 5-5-22 (2004).
[269] O.C.G.A. § 5-5-23 (2004).
[270] O.C.G.A. § 5-5-25 (2004).
[271] O.C.G.A. § 5-5-40(h) (2004).
[272] O.C.G.A. § 5-5-48 (2004).
[273] O.C.G.A. § 5-6-38(a) (2004) (discussing filing deadlines in instances in which the defendant files a motion for a new trial before filing a direct appeal).

Within twenty days of the hearing on the motion, the court reporter must file with the superior court a complete transcript of the proceedings on the motion for a new trial.[274] Additionally, in cases in which the motion was denied, the superior court must transmit the case to the Georgia Supreme Court for review of the defendant's sentence within thirty days after the entry of the order denying the motion, regardless of the defendant's decision to appeal.[275]

2. Direct Appeal and Sentence Review by the Georgia Supreme Court

The defendant also may challenge his/her conviction and death sentence by filing a notice of direct appeal with the Georgia Supreme Court.[276] The notice must be filed within thirty days after entry of the judgment except in cases in which the defendant filed a motion for a new trial.[277] In these cases, the notice must be filed within thirty days after the entry of the order on the motion.[278] One filing extension, not to exceed thirty days, may be granted at the discretion of the Court.[279]

The state as well as the defense must file appellate briefs within twenty days after the case is docketed.[280] The defense must also prepare an enumeration of errors, which concisely identifies each and every error relied upon, and incorporate the enumeration into the brief.[281] Oral arguments are mandatory[282] but are limited to thirty minutes per side.[283]

Regardless of whether the defendant files a direct appeal, the Georgia Supreme Court must review all death sentences.[284] If a direct appeal is filed, it must be consolidated with the Georgia Supreme Court's review of the defendant's death sentence.[285] In cases in which the defendant does not file a notice of appeal, the state and defense counsel may submit briefs and present oral arguments on the issue of the death sentence.[286]

In reviewing the death sentence, the Court must determine the following:

1. whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

---

[274] GA. UNIFIED APPEAL R. IV(A)(2)(e).
[275] GA. UNIFIED APPEAL R. IV(A)(3)(a)(2).
[276] O.C.G.A. §§ 5-6-34(a)(1), -37 (2004).
[277] O.C.G.A. § 5-6-38(a) (2004).
[278] *Id.*
[279] O.C.G.A. § 5-6-39(a)(1), (c) (2004).
[280] GA. SUP. COURT R. 10 (2004).
[281] O.C.G.A. § 5-6-40 (2004); GA. SUP. COURT R. 19 (2004).
[282] GA. SUP. COURT R. 50 (2004).
[283] GA. SUP. COURT R. 54 (2004).
[284] GA. UNIFIED APPEAL R. IV(A)(1)(a), (A)(3)(a)(2).
[285] O.C.G.A. § 17-10-35(f) (2004).
[286] O.C.G.A. § 17-10-35(d) (2004).

2. whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and
3. whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[287]

In its review of death penalty cases, whether or not a direct appeal has been filed, the Georgia Supreme Court also must "review each of the assertions of error timely raised by the [defendant] during the [superior court] proceedings . . . regardless of whether an assertion of error was presented to the [superior court] by motion for a new trial and regardless of whether error is enumerated in the [Georgia] Supreme Court. However, except in cases involving plain error, assertions of error not raised on appeal [are] waived."[288]

Following the review of the death sentence and any enumerations of error, the Georgia Supreme Court may affirm the death sentence, or set aside the death sentence and remand the case for resentencing, as well as *sua sponte* correct any errors found in the superior court proceedings[289] and vacate the conviction and remand to the superior court for further proceedings.[290] The Court's decision must reference the cases it considered when reviewing the proportionality of the defendant's death sentence.[291]

If the Court affirms the death sentence, the defendant may petition for a writ of *certiorari* with the United States Supreme Court.[292] The petition must be filed within ninety days of the judgment affirming the defendant's death sentence.[293] The United States Supreme Court may decline or accept the defendant's case for review.[294] If the United States Supreme Court reviews the case, the Court may affirm the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.[295]

If the Court affirms the conviction and sentence and the defendant wishes to continue challenging his/her conviction and sentence, s/he may petition for writ of habeas corpus under state law.

E. State Habeas Corpus

---

[287] O.C.G.A. § 17-10-35(c) (2004).
[288] GA. UNIFIED APPEAL R. IV(B)(2).
[289] O.C.G.A. § 17-10-35(e)(1), (2) (2004).
[290] *See generally* O.C.G.A. § 17-10-35(f) (2004).
[291] O.C.G.A. § 17-10-35(e) (2004).
[292] 28 U.S.C. § 1257 (2004).
[293] GA. SUP. COURT R. 13(1) (2004).
[294] GA. SUP. COURT R. 16(2)-(3) (2004).
[295] 28 U.S.C. § 2106 (2004).

Any individual "restrained of his[/her] liberty" as a result of a death sentence imposed by "any state court of record" may petition for a writ of habeas corpus to challenge the denial of his/her rights under the United States Constitution or the Georgia Constitution.[296] The petition must set forth the following:

1. The proceedings in which the petitioner was convicted;
2. The date of the final judgment;
3. How the petitioner's rights were violated;
4. All possible grounds of relief;
5. The claims raised at trial and direct appeal, if taken; and
6. Any previous proceedings taken to secure relief from his/her conviction, including state habeas corpus petitions, and in regard to state habeas corpus petitions, all claims that were raised in the petition.[297]

The petitioner must verify the petition with his/her oath or the oath of someone acting on his/her behalf.[298] The petitioner must also attach to the petition any affidavits,[299] records, or other evidence supporting his/her allegations or explain why s/he was unable to attach the necessary documents.[300]

Generally, the petition must be filed with the superior court in the county in which the petitioner is detained.[301] The petitioner may amend his/her petition up to 120 days after filing the original petition.[302] Any grounds of relief not raised by the petitioner in his/her original or amended petition are considered waived unless otherwise allowed by the United States Constitution or the Georgia Constitution, or unless the judge presiding over the petition finds that the grounds asserted could not reasonably have been raised in the original or amended petition.[303] The state must file a response or move to dismiss the petition within twenty days after the petition has been filed and docketed, or "within such further time" as set by the court.[304]

In all cases in which the petitioner is challenging, for the first time, state court proceedings resulting in the death penalty, the superior court clerk of the county where the petition was filed must, within ten days of the filing of the petition, serve a copy of

---

[296] *See* O.C.G.A. §§ 9-14-41, -42(a) (2004).
[297] O.C.G.A. §§ 9-14-44, -51 (2004).
[298] O.C.G.A. § 9-14-44 (2004).
[299] All affidavits must include the address and telephone number of the affiant; must be accompanied by a notice of the party's intention to introduce it into evidence; and must be served upon the opposing party at least ten days in advance of the date set for the hearing in the case. *See* O.C.G.A. § 9-14-48(c) (2004).
[300] O.C.G.A. § 9-14-44 (2004).
[301] O.C.G.A. § 9-14-43 (2004) (noting that "if the petitioner is not in custody or is being detained under the authority of the United States, and of the several states other than Georgia, or any foreign state, the petition must be filed in the superior court of the county in which the conviction and sentence which is being challenged was imposed").
[302] GA. UNIF. SUPER. CT. R. 44.7.
[303] O.C.G.A. § 9-14-51 (2004).
[304] GA. UNIF. SUPER. CT. R. 44.3; O.C.G.A. § 9-14-47 (2004).

the petition upon the Executive Director of the Council of Superior Court Judges of Georgia (Council) thereby requesting assistance with the assignment of a judge to hear the petition.[305] Within thirty days of receipt of the copy of the petition, the President of the Council must assign the case to a judge who is not within the circuit in which the conviction or sentence was imposed.[306]

Once a judge has been assigned, s/he may schedule a preliminary conference with the state and defense counsel.[307] The judge may also enter a scheduling order.[308] If the petitioner desires to file pre-trial motions, s/he must do so within sixty days after the filing of the petition. Similarly, state motions must be filed within ninety days after the filing of the petition.[309] Additionally, if discovery is authorized it must be completed within 120 days after the filing of the petition.[310] The evidentiary hearing must be conducted within 180 days of the filing of the petition.[311]

Within sixty days after the evidentiary hearing, the petitioner may file a brief in support of his/her petition,[312] and if directed by the court, s/he "shall file proposed findings of fact and conclusions of law and a proposed order."[313] Within ninety days after the evidentiary hearing, the respondent may file a brief in response, and, if directed by the court, the respondent "shall file proposed findings of fact and conclusions of law and a proposed order."[314] Within 100 days after the evidentiary hearing, the petitioner may file any reply brief.[315] The judge has the discretion to shorten time periods for various actions in a habeas corpus proceeding, or to lengthen these periods for "good cause."[316]

When making a decision in all cases, including those challenging for the first time state court proceedings resulting in the death penalty, the judge must review the trial record and the transcript of the proceedings to assess whether the petitioner complied with Georgia's procedural rules at trial and on appeal and whether the petitioner, if s/he had a new attorney on appeal, raised any claim of ineffective assistance of trial counsel on appeal.[317] If the petitioner failed to comply with Georgia's procedural rules or failed on direct appeal to raise a claim of ineffective assistance of counsel that could have been raised, the judge must deny his/her petition unless the petitioner shows cause for the

---

[305] O.C.G.A. § 9-14-47.1(b) (2004); GA. UNIF. SUPER. CT. R. 44.2.
[306] O.C.G.A. § 9-14-47.1(b) (2004); GA. UNIF. SUPER. CT. R. 44.4(A).
[307] GA. UNIF. SUPER. CT. R. 44.5.
[308] *Id.*
[309] O.C.G.A. § 9-14-47.1(c)(3) (2004); GA. UNIF. SUPER. CT. R. 44.6.
[310] O.C.G.A. § 9-14-47.1(c)(2) (2004); GA. UNIF. SUPER. CT. R. 44.7.
[311] O.C.G.A. § 9-14-47.1(c)(4) (2004); GA. UNIF. SUPER. CT. R. 44.8, 44.9.
[312] O.C.G.A. § 9-14-44 (2004); GA. UNIF. SUPER. CT. R. 44.11.
[313] GA. UNIF. SUPER. CT. R. 44.11.
[314] *Id.*
[315] *Id.*
[316] GA. UNIF. SUPER. CT. R. 44.5.
[317] O.C.G.A. § 9-14-48(d) (2004).

noncompliance and actual prejudice.[318] In all cases, habeas corpus relief must be granted to avoid a miscarriage of justice.[319]

The judge must issue a ruling on the petition and written findings of fact and conclusions of law within ninety days of the filing of the respondent's brief, or of the filing of the petitioner's reply brief, if filed.[320] If the judge finds in favor of the petitioner, it must "enter an appropriate order with respect to the judgment or sentence challenged in the proceedings and such supplementary orders as to rearraignment, retrial, custody, or discharges as may be necessary and proper."[321] In cases in which the petition is denied, the petitioner may appeal the decision by filing a written application for "a certificate of probable cause to appeal" with the clerk of the Georgia Supreme Court and a notice of appeal with the clerk of the relevant superior court within thirty days from entry of the order denying relief.[322] In considering whether probable cause exists to appeal, the Georgia Supreme Court may consider the record and transcript.[323] If the court finds that probable cause to appeal does exist, the proper standard of review on appeal "requires that [the reviewing court] accept the habeas court's factual findings and credibility determinations unless clearly erroneous, but [the reviewing court will] independently apply the legal principles to the facts."[324] If the court finds that probable cause does not exist to appeal, the application will be denied.

The petitioner may seek review of this denial by petitioning for a writ of *certiorari* with the United States Supreme Court.[325]

F. Federal Habeas Corpus

A petitioner wishing to challenge his/her conviction and death sentence as being in violation of federal law may file a petition for a writ of habeas corpus with the appropriate federal judicial district.[326] Georgia has three federal judicial districts: the Northern, Middle, and Southern. The petitioner may be entitled to appointed counsel to prepare his/her petition if s/he "is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services."[327]

---

[318] *Id.*
[319] *Id.*
[320] GA. UNIF. SUPER. CT. R. 44.12.
[321] O.C.G.A. § 9-14-48(d) (2004).
[322] O.C.G.A. § 9-14-52(b) (2004). It should be noted that in cases in which the petitioner is granted relief, the state may appeal without obtaining a certificate of probable cause. *See id.*
[323] O.C.G.A. § 9-14-52(b), (c) (2004) (noting that the superior court must then transmit to the Georgia Supreme Court the record and, if requested, the transcript).
[324] West v. Waters, 533 S.E.2d 88, 90 (Ga. 2000) (citing Zant v. Means, 522 S.E.2d 449 (Ga. 1999)).
[325] *See supra* notes 292-295 and accompanying text.
[326] *See infa* note 333 and accompanying text.
[327] 21 U.S.C. § 848(q)(4)(B) (2004); McFarland v. Scott, 512 U.S. 849, 856-57 (1994).

Prior to filing a petition for a writ of habeas corpus, the petitioner must have raised all relevant federal claims in state court; the failure to exhaust all state remedies available on appeal and collateral review is grounds to dismiss the petition.[328] The district court cannot consider an unexhausted claim presented in the petition unless it is plainly meritless.[329]

In a petition for a writ of habeas corpus, the petitioner must identify and raise all possible grounds of relief and identify the facts supporting each ground.[330] If the petitioner challenges a state court's determination of a factual issue, the petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that state court factual determinations are reasonable in light of the evidence presented in the state court.[331] If the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court's decision of the claim was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts in light of the evidence presented.[332]

The petition must be filed in the federal district court in the district in which the petitioner is in custody or in the district where the petitioner was convicted and sentenced.[333] The deadline for filing the petition is one year[334] from the date on which: (1) the judgment

---

[328] 28 U.S.C. § 2254(b)(1) (2004). Under certain circumstances, a federal district court can stay a petition that raises both exhausted and unexhausted constitutional violations to allow the petitioner an opportunity to present his unexhausted claims in state court. Rhines v. Weber, 125 S. Ct. 1528 (2005).

[329] 28 U.S.C. § 2254(b)(1), (2) (2004).

[330] RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

[331] 28 U.S.C. § 2254(e)(1) (2004).

[332] 28 U.S.C. § 2254(d) (2004).

[333] 28 U.S.C. §§ 2254, 2241(d) (2004); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. P. 22(a) (2004).

[334] In states that have "opted-in" to the "Special Habeas Corpus Procedures in Capital Cases," 28 U.S.C. §§ 2261 through 2266, the deadline for federal habeas corpus petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired. *See* 28 U.S.C. § 2263(a) (2004). A state may only "opt-in" to these expedited procedures if it has established by state law, rule of the court of last resort, or by another agency authorized by state law a mechanism for appointing, compensating, and reimbursing competent counsel for indigent prisoners in state post-conviction proceedings. *See* 28 U.S.C. § 2261(b) (2004). The state also must provide either through court rule or statute standards of competency for the appointment of counsel. *See* 28 U.S.C. § 2261(b) (2004). The mechanism for appointing, compensating, and reimbursing competent counsel must:

> (1) offer counsel to all state prisoners under capital sentence, and
> (2) provide the court of record the opportunity to enter an order (a) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable completely to decide whether to accept or reject the offer; (b) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (c) denying the appointment of counsel upon a finding that the prisoner is not indigent.

See 28 U.S.C. § 2261 (2004). It does not appear that Georgia is eligible to "opt in" to the Special Habeas Corpus Procedures in Capital Cases given that it does not provide counsel for state habeas corpus.

became final; (2) the State impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence.[335] The one-year time limitation may be tolled if the petitioner is pursing a properly filed application for state post-conviction relief or other collateral review.[336]

Once the petition is filed, a district court judge reviews it to determine whether, based on the face of the petition, the petitioner is entitled to relief in the district court.[337] If the judge finds that the petitioner is not entitled to relief, the judge may summarily dismiss the petition.[338] In contrast, if the judge finds that the petitioner may be entitled to district court relief, the judge will order the respondent to file an answer replying to the allegations contained in the petition.[339] In addition to the answer, the respondent must file all portions of the state court transcripts it deems relevant to the petition.[340] The judge on his/her own motion or on the motion of the petitioner may order that additional portions of the state court transcripts be made part of the record.[341]

Additionally, either party may submit a request for discovery.[342] The judge may grant the request if the requesting party establishes "good cause."[343] The judge also may direct, or the parties may request, expansion of the record by providing additional evidence relevant to the merits of the petition.[344] This may include: letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.[345]

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing is required.[346] The judge may not hold an evidentiary hearing on a claim on which a petitioner failed to develop the underlying facts in the state court proceedings unless: (1) the facts support a newly recognized constitutional rule, made retroactive by the United States Supreme Court, that was previously unavailable, or the facts could not have been previously discovered through the exercise of due diligence, and (2) the facts underlying the claim would be sufficient to establish that but for the constitutional error no reasonable fact finder would have found the applicant guilty of the underlying offense.[347] If the judge decides that an evidentiary hearing is unnecessary, the judge will make a decision on the petition without additional

---

[335] 28 U.S.C. § 2244(d)(1) (2004).
[336] 28 U.S.C. § 2244(d)(2) (2004).
[337] RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[338] *Id.*
[339] RULES 4 & 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[340] RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[341] *Id.*
[342] RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[343] *Id.*
[344] RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[345] RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[346] RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[347] 28 U.S.C. § 2254(e)(2) (2004); Williams v. Taylor, 529 U.S. 420 (2000).

evidence.[348] If an evidentiary hearing is required, the judge should conduct the hearing as promptly as possible.[349]

During the evidentiary hearing, the judge will resolve any factual discrepancies that are material to the petitioner's claims. Based on the evidence presented, the judge may grant the petitioner a new guilt/innocence or sentencing phase or a new appeal, or leave the conviction and sentence intact.

In order to appeal the district court judge's decision, the applicant for the appeal must file a notice of appeal with the district court within thirty days after the judgment.[350] If the petitioner seeks to appeal, s/he must also request a "certificate of appealability" from either a district or circuit court judge.[351] A judge may issue a "certificate of appealability" only as to those claims on which the petitioner makes in the request for the certificate a substantial showing of the denial of a constitutional right.[352] If the "certificate of appealability" is granted, the appeal will proceed to the Eleventh Circuit Court of Appeals.

In rendering its decision, the Eleventh Circuit may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments. Based on the evidence, the Eleventh Circuit may order a new appeal, an evidentiary hearing by the federal district court, or a new guilt/innocence or sentencing phase in the superior court.

Both parties may then seek review of the Eleventh Circuit Court's decision by filing a petition for a writ of *certiorari* in the United States Supreme Court.[353] The United States Supreme Court may either grant or deny review of the petition. If the Court grants review of the petition it may deny the petitioner relief or order a new guilt/innocence phase, a new sentencing phase, or other procedures in the lower federal courts or the state court.

If the petitioner wishes to file a second or successive habeas corpus petition with the district court, s/he must submit a motion to the Eleventh Circuit Court of Appeals requesting an order authorizing the petitioner to file and the district court to consider the petition.[354] A three-judge panel of the Eleventh Circuit must consider the motion.[355] The panel must specifically assess whether the petition makes a *prima facie* showing that the claim presented in the second or successive petition was not previously raised and that the new claim (1) relies on a new, previously unavailable constitutional rule, or (2) relies on newly discovered, previously unascertainable facts that, if proven, would be sufficient

---

[348] RULE 8(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[349] RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.
[350] FED. R. APP. P. 4(a)(1)(A) (2004).
[351] 28 U.S.C. § 2253(c)(1) (2004); FED. R. APP. P. 22(b)(3) (2004).
[352] 28 U.S.C. § 2253(c)(2) (2004).
[353] 28 U.S.C. § 1254(1) (2004).
[354] 28 U.S.C. § 2244(a)(3)(A) (2004).
[355] 28 U.S.C. § 2244(b)(3)(B) (2004).

to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[356] Claims of factual innocence ("actual innocence") must meet the requirements of the latter provision.[357] Any second or successive petition that presents a claim raised in a prior petition will be dismissed.[358]

If the Eleventh Circuit denies the motion for authorization, the petitioner may not seek appellate review of the decision.[359] If the Eleventh Circuit grants the motion, then the second or successive motion will proceed through the same process that the initial petition went through.

The petitioner may seek final review of his/her conviction and sentence by filing a petition for clemency.[360]

G. Clemency

The State Board of Pardons and Paroles (Board), created in 1943, possesses the authority to grant executive clemency, including reprieves, pardons,[361] and commutations of sentences.[362] The Board is composed of five members;[363] each is appointed by the Governor for a renewable seven-year full-time term that is subject to Senate confirmation.[364] The Georgia Attorney General, also appointed by the Governor, serves as a legal advisor to the Board.[365] Although the Governor controls the composition of the

---

[356] 28 U.S.C. § 2244(b)(2) (2004).

[357] 28 U.S.C. § 2244(b)(2)(B) (2004); *In re* Medina, 109 F.3d 1556, 1565-66 (11th Cir. 1997) (noting that the "§ 2244(b)(2)(B) exception to the bar against second habeas applications has no application to claims that relate only to the sentence"); *see also Habeas Relief for State Prisoners*, 91 GEO. L.J. 817, 843-85 n.2617 (2003).

[358] 28 U.S.C. § 2244(b)(1) (2004).

[359] 28 U.S.C. § 2244(b)(3)(E) (2004).

[360] Board of Pardons and Paroles, 28 U.S.C. § 2244, *at* http://www.pap.state.ga.us/other_forms_clemency.htm (last visited on Aug. 16, 2005).

[361] Rule 475-3-10(3) of the Rules of the State Board of Pardons and Paroles defines "pardon" as "a declaration that a person is relieved from the legal consequences of a particular conviction. It restores civil and political rights and removes all legal disabilities resulting from the conviction." *See* GA. COMP. R. & REGS. 475-3-.10(3) (2004).

[362] GA. CONST. art. IV, § 2, para. 2(a).

[363] O.C.G.A. § 42-9-2 (2004). Each year the Board must elect one of its members as Chairman of the Board. *See* O.C.G.A. § 42-9-6(a) (2004).

[364] O.C.G.A. §§ 42-9-2, -4 (2004); GA. COMP. R. & REGS. 475-1-.01 (2004); Board of Pardons and Paroles, Frequently Asked Questions, *at* http://www.pap.state.ga.us/faq's.htm (last visited on Aug. 16, 2005). The current Board consists of the following members: Board Chairman Milton E. Nix, Jr., former Director of the Georgia Bureau of Investigation; Garfield Hammonds, former DEA Special Agent in charge of Southeast Region; Garland R. Hunt, lawyer, consulting company owner, pastor and counselor; L. Gale Buckner, former Executive Director of the Criminal Justice Coordinating Council in the Office of the Governor; and Dr. Eugene Walker, former Commissioner of the Department of Juvenile Justice. *See* Board of Pardons and Paroles, Current Georgia Parole Board Members, *at* http://www.pap.state.ga.us/current_members.htm (last visited Aug. 16, 2005).

[365] O.C.G.A. § 42-9-10 (2004).

Board, s/he has no direct authority to grant or deny pardons or to commute death sentences.[366] For a detailed discussion on this subject, see Chapter Nine - Clemency.

H. Execution

After the superior court judge imposes a death sentence, s/he must specify a seven-day period of time within which the inmate's execution should be carried out.[367] This time period must begin within twenty to sixty days of the date of sentencing.[368] The Department of Corrections must then designate a place for the execution[369] and the specific day and time for the execution within the time period set by the judge.[370]

At least two days but no more than twenty days before the scheduled execution, the inmate must be transferred to the appropriate state correctional institution unless the execution was postponed as a result of appellate review or stayed by the State Board of Pardons and Paroles.[371] If the execution had previously been postponed or stayed, a superior court judge within the county in which the inmate was tried may schedule a new period of time within which the execution should be carried out.[372]

The inmate's execution must be carried out by lethal injection.[373] The superintendent of the state correctional institution or a deputy superintendent, at least three executioners, and two physicians must be present for the execution.[374] Additionally, the commissioner of corrections must determine whether to have other correctional officers, assistants, technicians, and witnesses present for the execution.[375] Similarly, at the request of the defendant, the commissioner of corrections may authorize the presence of the inmate's counsel, a member of a clergy, and some of the inmate's relatives and friends.[376]

Once the execution has been carried out, the executioner and the attending physicians must certify the "fact of execution" to the clerk of the superior court of the county in which the sentence was imposed.[377]

---

[366] O.C.G.A. § 42-9-56 (2004).
[367] O.C.G.A. §§ 17-10-33, -34 (2004).
[368] O.C.G.A. §§ 17-10-33, -34 (2004).
[369] O.C.G.A. § 17-10-44 (2004).
[370] O.C.G.A. § 17-10-40(c) (2004).
[371] O.C.G.A. § 17-10-33 (2004).
[372] O.C.G.A. § 17-10-40(a) (2004); *see also* O.C.G.A. § 17-10-40(b) (2004) (stating "[t]he new period for the execution shall be seven days in duration and shall commence at noon on a specified date and shall end at noon on a specified date").
[373] O.C.G.A. § 17-10-38(a) (2004) (defining "lethal injection" as "the continuous intravenous injection of a substance or substances sufficient to cause death into the body of the person sentenced to death until such person is dead").
[374] O.C.G.A. § 17-10-41 (2004).
[375] *Id.*
[376] *Id.*
[377] O.C.G.A. § 17-10-42 (2004).

1. Mental Competency to be Executed

An inmate who is sentenced to death but found to be "mentally incompetent to be executed" may not be executed.[378] An inmate is mentally incompetent to be executed if "because of a mental condition [s/he] is presently unable to know why [s/he] is being punished and understand the nature of the punishment."[379] See the Mental Retardation and Mental Disability Section for a more detailed discussion on this subject.

---

[378] O.C.G.A. § 17-10-61 (2004).
[379] O.C.G.A. § 17-10-60 (2004).

CHAPTER TWO

COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

INTRODUCTION TO THE ISSUE

DNA testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.[1] Since then, over thirty-five jurisdictions have adopted laws concerning post-conviction DNA testing.[2] However, the standards for preserving biological evidence and for seeking and obtaining post-conviction DNA testing vary widely among the states.

Many who may have been wrongfully convicted cannot prove their innocence because states often fail adequately to preserve material evidence. Written procedures for collecting, preserving and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.[3] The procedures should be regularly updated as new or improved techniques and methods are developed. The procedures should impose professional standards on all state officials responsible for handling or testing biological evidence, and the procedures should be enforceable through the agency disciplinary process.[4]

Accuracy in criminal investigations should also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,[5] and through the priorities and practices of other police oversight groups.[6]

---

[1] *See* ABA Criminal Justice Section, Recommendation 115, 2000 Annual Meeting, *available at* http://www.abanet.org/crimjust/policy/cjpol.html#am00115 (last visited on Dec. 12, 2005).

[2] *See* National Conference of State Legislatures, DNA & Crime, *at* http://www.ncsl.org/programs/health/genetics/dna.htm (last visited on Dec. 12, 2005); *see also* Innocence Project, Legislative Page, *at* http://www.innocenceproject.org/legislation/index.php (last visited on Dec. 12, 2005).

[3] *See* 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-4.3) ("Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies."); *Id.* (Standard 1-5.1) (police should be "made fully accountable" to their supervisors and to the public for their actions).

[4] *See id.* (Standard 1-5.3(a)) (identifying "[c]urrent methods of review and control of police activities").

[5] Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

[6] Such organizations include the U.S. Department of Justice which is empowered to sue police agencies under authority of the pattern and practice provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2005); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies,

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. It also should acquaint law enforcement officers with actual cases where illegal, unethical or unprofessional behavior led to the arrest, prosecution or conviction of an innocent person.[7]

Initial training is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods.

Even the best training and the most careful and effective procedures will be useless if the investigative methods reflected in the training or required by agency procedures or law are unavailable.[8] Appropriate equipment, expert advice, investigative time, and other resources should be reasonably available to law enforcement personnel when law, policy or sound professional practice call for them.[9]

Inc., (CALEA) is an independent peer group that has accredited law enforcement agencies in all 50 states. Similar, state-based organizations exist in many places, as do government established independent monitoring agencies. *See* CALEA Online, *at* http://www.calea.org/ (last visited on Jan. 6, 2006). Crime laboratories may be accredited by the American Society of Crime Laboratory Directors–Laboratory Accreditation Board (ASCLD-LAB) or the National Forensic Science Technology Center (NFSTC). ASCLD-LAB, *at* http://www/ascld-lab.org (last visited on Jan. 6, 2006); NFSTC, *at* http://www.nfstc.org/ (last visited on Jan. 6, 2006).

[7] Standard 1-7.3 provides:

(a) Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.
(b) Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-7.3); *see also id.* (Standard 1-5.2(a)) (noting value of "education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society").

[8] *See generally* 1 ABA Standards for Criminal Justice, Urban Police Function, Part VII (2d ed. 1979) ("Adequate Police Resources").

[9] *See, e.g.*, ABA House of Delegates, Report No. 8A, 2004 Midyear Meeting (requiring videotaping of interrogations).

I. FACTUAL DISCUSSION

Since Georgia reinstated the death penalty in 1973, five Georgia death-row inmates have been exonerated.[10] As part of an effort to "ensure that innocent people are not kept in prison for serious crimes they did not commit," Senator David Adelman, in early 2003, introduced Senate Bill (SB) 119 providing for the preservation of evidence and post-conviction forensic deoxyribonucleic acid (DNA) testing in certain cases.[11] SB 119 became effective upon the Governor's signature on May 27, 2003.[12]

SB 119 amended the Official Code of Georgia Annotated (O.C.G.A.) by adding procedures that (1) require the preservation of evidence in criminal cases; and (2) allow inmates to request post-conviction DNA testing in certain instances.[13] The majority of these new procedures apply to all inmates, regardless of their conviction date.[14]

A. Preservation of DNA Evidence and Other Types of Evidence

As of May 27, 2003, all governmental entities in possession of any physical evidence from a criminal case are required to "maintain any physical evidence collected at the time of the crime that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime."[15] In criminal cases involving the prosecution of a "serious violent felony,"[16] any physical evidence containing biological material must be maintained for ten years after the judgment

---

[10] *See* Death Penalty Information Center, Cases of Innocence 1973 - Present, *available at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=109 (last updated on Aug. 16, 2005). The names of the five exonerated individuals are as follows: James Creamer (released in 1975), Earl Charles (released in 1978), Jerry Banks (released in 1980), Robert Wallace (acquitted at retrial in 1987), and Gary Nelson (released in 1991). The definition of innocence used by the Death Penalty Information Center ("DPIC") in placing defendants on the list of exonerated individuals is that "they had been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id*. Henry Drake, who was convicted of murder and sentenced to death in Georgia in 1977, is not on DPIC's list. Although Drake received an absolute pardon based on actual innocence, he received his absolute pardon after his death sentence had been vacated by the federal appeals court and he was re-sentenced to life in prison, meaning he received an absolute pardon from his life sentence, rather than death row. *See* Drake v. Kemp, 762 F.2d 1449, 1461 (11th Cir. 1985); Gibson v. Turpin, 513 S.E.2d 186, 198 n.28 (Ga. 999); Forejustice, Wrongly Convicted Database Record: Henry Arthur Drake, *at* http://forejustice.org/db/Drake__Henry_Arthur_.html (last visited on Sept. 20, 2005).

[11] Melissa T. Rife, *Searches and Seizures: Provide Extraordinary Appeals and Motions for New Trial Based on Request for DNA Testing and Analysis; Establish Procedure for Preservation of Evidence*, 20 GA. ST. U. L. REV. 119, 120 (2003).

[12] *Id*. at 121.

[13] 2003 Ga. Laws 37.

[14] *Id.*

[15] O.C.G.A. § 17-5-56(a) (2005); *see also* Phillips v. State, 604 S.E.2d 520, 529 n.6 (Ga. Ct. App. 2004) (noting that "[w]e take this opportunity to remind trial courts, clerks of court, law enforcement agencies, and other records' custodians across the state of their important statutory duties regarding preservation of evidence").

[16] O.C.G.A. § 17-10-6.1 (2005).

becomes final or ten years after May 27, 2003, whichever is later.[17] When the death penalty is imposed, however, this evidence must be "maintained until the sentence in the case has been carried out."[18]

1. Law Enforcement Procedures for the Pre-Trial Preservation of Evidence

All police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Georgia certified by the Commission on Accreditation for Law Enforcement Agencies (CALEA)[19] and/or the Georgia Law Enforcement Certification Program (GLECP)[20] are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on the collection, preservation, and use of physical evidence.[21] CALEA further requires a written directive establishing guidelines and procedures for collecting, processing, and preserving physical evidence in the field.[22]

---

[17] O.C.G.A. § 17-5-56(b) (2005).

[18] *Id.*

[19] Forty-two police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Georgia have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). *See* CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited on Sept. 23, 2005) (use second search function, designating "U.S." and "Georgia" as search criteria); *see also* CALEA Online, About CALEA, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited on Sept. 23, 2005) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: the International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; and (5) participating in an on-site assessment by a team selected by the Commission to determine compliance who will submit a compliance report to the Commission. *See* CALEA Online, The Accreditation Process, *at* http://www.calea.org/newweb/accreditation%20Info/process1.htm (last visited on Sept. 23, 2005). After completion of these steps, a hearing is held where a final decision on accreditation is rendered. *Id.*

[20] Ninety police, sheriff's, state law enforcement, transportation police, and university police departments have obtained certification under the GLECP. GEORGIA LAW ENFORCEMENT CERTIFICATION PROGRAM: STANDARDS MANUAL, at intro. (3d ed. 2002) [hereinafter GLECP STANDARDS] (noting that the Georgia Law Enforcement Certification Program was established in 1997 as a stepping-stone to national accreditation under CALEA's Standards for Law Enforcement Agencies). Georgia Association of Chiefs of Police, State Certified Agencies, *at* http://www.gachiefs.com/statecertification/StateCertifiedAgencies.html (last visited on Jan. 6, 2006).

[21] COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1); GLECP STANDARDS, *supra* note 20, at 31 (Standard 5.23).

[22] CALEA STANDARDS, *supra* note 21, at 83-1 (Standard 83.2.1).

The Georgia Department of Community Affairs also has developed a Model Law Enforcement Operations Manual (MLEOM), which contains "professional standards and requirements for law enforcement operations,"[23] including standards on the proper collection and preservation of evidence.[24] The Georgia Department of Community Affairs suggests that the MLEOM be used to assist law enforcement agencies in developing or revising their own polices and procedures.[25] The Georgia Association of Chiefs of Police has adopted the MLEOM as its own "Sample Law Enforcement Operations Manual" (SLEOM).[26]

In addition to the requirements for law enforcement agency certification and the model procedures for law enforcement agencies, individual law enforcement officers ("peace officers"[27]) are statutorily required to meet certain criteria[28] and complete a basic course[29] that consists of 404 hours of training, including eighteen hours of instruction in such relevant areas as crime scene processing and death investigations.[30] Specifically, the

---

[23] GA. DEP'T OF CMTY. AFFAIRS, MODEL LAW ENFORCEMENT OPERATIONS MANUAL, Acknowledgement, *at* http://www.dca.state.ga.us/development/research/programs/downloads/law/ackn.html (last visited on Oct. 4, 2005).

[24] GA. DEP'T OF CMTY. AFFAIRS, MODEL LAW ENFORCEMENT OPERATIONS MANUAL 13-1, 17-1 (6th ed. 1996) [hereinafter MLEOM], *available at* http://www.dca.state.ga.us/development/research/programs/downloads/law/Law.html (last visited on Oct. 4, 2005).

[25] *Id.*

[26] *See* GA. ASS'N OF CHIEFS OF POLICE, SAMPLE LAW ENFORCEMENT OPERATIONS MANUAL [hereinafter SLEOM], *available at* http://www.gachiefs.com/Sample%20LE%20Manual/SCHAPTER17.doc (last visited on Oct. 4, 2005). Chapter 17 contains standards pertaining to the collection and preservation of physical evidence, such as requiring evidence to be preserved for "forensic processing, fingerprints, ballistics, etc." and "packaged . . . to ensure constant protection." *Id.*

[27] A "peace officer" is defined, for the purposes of this Section, as "an agent, operative, or officer of this state, a subdivision or municipality thereof, . . . who, as an employee for hire or as a volunteer, is vested either expressly by law or by virtue of public employment or service with authority to enforce the criminal or traffic laws through the power of arrest and whose duties include the preservation of public order, the protection of life and property, and the prevention, detection, or investigation of crime." *See* O.C.G.A. § 35-8-2(8)(A) (2005).

[28] O.C.G.A. § 35-8-8(a) (2005). One must (1) be at least 18 years of age; (2) be a citizen of the United States; (3) have obtained a high school diploma or the recognized equivalent; (4) not have been convicted of any state or federal felonies or sufficient misdemeanors to establish a pattern of disregard for the law; (5) be fingerprinted for a background check; (6) possess good moral character; (7) complete an oral interview; (8) be found free from an adverse physical, emotional, or mental condition; and (9) successfully complete the basic training course entrance examination. *Id.*; *see also* GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL R. 464-3-.02(a) (2005), *available at* http://www.gapost.org/5Trng.htm (last visited on Oct. 4, 2005).

[29] O.C.G.A. § 35-8-9(a) (2005); GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL R. 464-3-.03(a) (2005), *available at* http://www.gapost.org/5Trng.htm (last visited on Oct. 4, 2005). The basic course must be completed at a Georgia Peace Officer Standards and Training Council (POST) certified academy. *See* O.C.G.A. § 35-8-11 (2005).

[30] GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, 404 HOUR BASIC LAW ENFORCEMENT TRAINING COURSE (11th ed. 2003) (table of contents), *available at* http://www.gapost.org/pdf_file/bletc404.pdf (last visited on Oct. 4, 2005).

course provides training regarding (1) the searches of various crime scenes,[31] and (2) the proper methods for collecting, packaging, and identifying trace materials, fingernail scrapings, hair, and other biological evidence, such as blood and bodily fluids, in order to prevent contamination.[32] Additionally, to assist these law enforcement officers and Georgia law enforcement agencies, certified or otherwise, with the submission of evidence to crime laboratories of the Georgia Bureau of Investigation's Division of Forensic Sciences (Division), the Division has established and posted on its website a manual entitled "Laboratory Services and Requirements for Submitting Evidence."[33]

All Division laboratories that are accredited by the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directions/Laboratory Accreditation Board (ASCLD/LAB) and/or possess ISO/IEC 17025 General Requirements for the Competency of Testing and Calibration Laboratories (ISO/IEC 17025) accreditation through the Forensic Quality Services-International Division of the National Forensic Science Technology Center (FQS-I) are required to adopt or abide by certain procedures relating to the preservation of evidence.[34] For example, the ASCLD/LAB specifically requires the laboratory to have a written or secure electronic chain of custody record with all necessary data, which provides for the complete tracking of all evidence, and to have a secure area for overnight and/or long-term storage of evidence.[35] All evidence must also be marked for identification, stored under proper seal, meaning that the contents cannot readily escape, and protected from loss, cross transfer, contamination and/or deleterious change.[36] Similarly, ISO/IEC 17025 requires the laboratory to have "procedures for the transportation, receipt, handling, protection, storage, retention and/or disposal of test and/or calibration items."[37]

---

[31] GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, 404 HOUR BASIC LAW ENFORCEMENT TRAINING COURSE 5.2-10 to -14 (11th ed. 2003) [hereinafter POST COUNCIL BASIC TRAINING COURSE].

[32] *Id.* at 5.2-26 to -29, -33 to -37, -42, -44 to -46.

[33] *See* Georgia Bureau of Investigation, Division of Forensic Services, Laboratory Services and Requirements for Submitting Evidence, *at* http://www.ganet.org/gbi/labmanual.html (last visited on Sept. 28, 2005).

[34] Seven of the eight Division laboratories are currently accredited through the ASCLD/LAB program, including (1) Headquarters Crime Laboratory, (2) Central Regional Crime Laboratory, (3) Coastal Regional Crime Laboratory, (4) Eastern Regional Crime Laboratory, (5) Northwestern Regional Crime Laboratory, (6) Southwestern Regional Crime Laboratory, and (7) Western Regional Crime Laboratory. *See* American Society of Crime Laboratory Directors, Laboratories Accredited by ASCLS/LAB, *at* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#GA (last visited on Sept. 16, 2005). Similarly, seven laboratories possess ISO-IEC 17025 accreditation, including (1) Headquarters Laboratory, (2) Eastern Regional Crime Laboratory, (3) Western Regional Crime Laboratory, (4) Central Regional Crime Laboratory, (5) Southwestern Regional Crime Laboratory, (6) Coastal Regional Laboratory, and (7) Northwestern Regional Crime Laboratory. *See* National Forensic Science Technology Center, Forensic Quality Services-International Division, ISO/IEC Accredited Laboratories, *at* http://www.forquality.org/accreditation.htm#atlanta (last visited Sept. 20, 2005).

[35] AM. SOC'Y OF CRIME LAB. DIRS., LAB. ACCREDITATION BD., 2003 MANUAL 20-23 [hereinafter ASCLD/LAB 2003 MANUAL] (on file with author).

[36] *Id.*

[37] NATIONAL FORENSIC SCIENCE TECHNOLOGY CENTER, FORENSIC QUALITY SERVICES-INTERNATIONAL DIVISION, GENERAL REQUIREMENTS FOR ACCREDITATION 37 [hereinafter FQS-I, ISO/IEC 17025

2. Court Procedures for Preservation of Evidence during and After Trial

In all criminal cases, the judge must designate the court clerk, the court reporter, or any other officer of the court "to be the custodian of any property that is introduced into evidence" during the trial.[38] The custodian of the property must "inventory the evidence and create an evidence log within [thirty] days of the entry of the judgment."[39] The evidence log must include the following information: (1) case number, (2) style of the case, (3) description of the item, (4) exhibit number, (5) the name of the person creating the evidence log, and (6) the location where the physical evidence is stored.[40] Once the log is completed, the judge must order the court clerk, "the prosecuting attorney, or the law enforcement agency involved in prosecuting the case to obtain and store the evidence."[41] This transfer of evidence and any other transfers of evidence must be noted in the evidence log.[42]

B. Post-Conviction DNA Testing

Pursuant to section 5-5-41(c)(1) of the O.C.G.A., inmates convicted of a "serious violent felony"[43] may apply for post-conviction DNA testing by requesting the testing as part of a motion for a new trial and/or as part of an extraordinary motion for a new trial.[44] Additionally, based on the Georgia Court of Appeal's decision in *Clark v. State*,[45] it appears that inmates convicted of a serious violent felony may also apply for post-conviction DNA testing by filing a motion for DNA testing separate and apart from a motion for a new trial or an extraordinary motion for a new trial,[46] but the filing procedures and limitations for this motion are unclear.

An inmate who requests post-conviction DNA testing as part of a motion for a new trial must file his/her motion within thirty days of the entry of judgment.[47] If the inmate filed a motion for a new trial within the thirty day period and the motion was overruled or s/he failed to file the motion within the thirty day period, s/he may file an extraordinary

---

ACCREDITATION STANDARDS] (Standard 5.8.1), *at* http://www.forquality.org/FQS-I%20Acc%20Docs/GRA-FQS-I-05-04.pdf (last visited Sept. 20, 2005).

[38] O.C.G.A. § 17-5-55(a) (2005).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See* O.C.G.A. § 17-10-6.1(a) (2005) (defining a "serious violent felony" to include: (1) murder or felony murder, as defined in O.C.G.A. § 16-5-1; (2) armed robbery, as defined in O.C.G.A. § 16-8-41; (3) kidnapping, as defined in O.C.G.A. § 16-5-40; (4) rape, as defined in O.C.G.A. § 16-6-1; (5) aggravated child molestation, as defined in O.C.G.A. § 16-6-4; (6) aggravated sodomy, as defined in O.C.G.A. § 16-6-2; or (7) aggravated sexual battery, as defined in O.C.G.A. § 16-6-22.2).

[44] O.C.G.A. § 5-5-41(c)(1) (2005); 2003 Ga. Laws 37, § 1.

[45] *See* State v. Clark, 615 S.E.2d 143 (Ga. Ct. App. 2005).

[46] *Id.* at 146.

[47] O.C.G.A. § 5-5-41(a) (2005).

motion for a new trial at any time, but the inmate must show "some good reason" for the delay.[48] Each inmate may file only one extraordinary motion.[49] However, an inmate convicted of a "serious violent felony" before May 27, 2003, who prior to that time filed an extraordinary motion for a new trial, may file a second extraordinary motion if "the issue of DNA was not raised or denied in" the prior motion.[50]

All motions requesting post-conviction DNA testing, regardless of whether the request is made as part of a motion for a new trial or as part of an extraordinary motion for a new trial, or separate and apart from any other motion, must "state"[51] and "show [52] or provide" certain information. The inmate must "state" as follows: (1) that the motion for post-conviction DNA testing is not filed for the purpose of delay; and (2) that the request for DNA testing is being made for the first time or, if it is not being made for the first time, the requested DNA testing was never ordered in any prior court proceeding.[53]

In addition, the inmate must "show or provide" the following:

1. Evidence that potentially contains [ ] DNA was obtained in relation to the crime and subsequent indictment, which resulted in his/her conviction;
2. The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the [inmate] or to the [inmate's] trial attorney prior to trial or because the technology for the testing was not available at the time of trial;
3. The identity of the perpetrator was, or should have been, a significant issue in the case;
4. The requested DNA testing would raise a reasonable probability that the [inmate] would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;
5. A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;
6. The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;
7. If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described [by the aforementioned numbers (1) through (6)], and any

---

48 O.C.G.A. § 5-5-41(a), (b) (2005).
49 O.C.G.A. § 5-5-41(b) (2005).
50 2003 Ga. Laws 37, § 5.
51 "State" is not equivalent to "show." *See* Crawford v. State, 597 S.E.2d 403, 404 (Ga. 2004).
52 "Show" is not tantamount to "prove." *See id.*
53 O.C.G.A. § 5-5-41(c)(4) (2005); *see also* 2003 Ga. Laws 37, § 5 (stating that "[n]otwithstanding the provisions of subparagraph (c)(4)(B) of Code Section 5-5-41, any person convicted of a serious violent felony…which conviction was imposed prior to the effective date of this Act, who has, prior to the effective date of this Act, previously litigated in a court of this state or the United States the issue of post-conviction DNA testing and who was denied DNA testing may file an extraordinary motion for new trial").

persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

8. The names, addresses, and telephone numbers of all persons or entities who may testify for the [inmate] and a description of the subject matter and summary of the facts to which each person or entity may testify.[54]

The motion must be filed with the trial court that entered the judgment of conviction in the inmate's case.[55] The filing of the motion does not automatically stay the inmate's execution.[56] Once the motion has been filed, the court must order the state to preserve, during the pendency of the proceeding, all evidence containing biological materials.[57] The inmate may also apply for an order directing that the evidence be preserved beyond the time period allotted and until the judgment in the action becomes final.[58] The application for the order must be filed "prior to the expiration of time prescribed for the preservation of evidence" and with the court in which the inmate was convicted.[59]

The inmate's motion must be served on the District Attorney and the Attorney General.[60] Upon being served, the state will have sixty days to file a response to the inmate's motion, if it so desires.[61]

If, and only if, the inmate's motion contains all of the necessary information is the court required to order a hearing on the motion.[62] For example, an inmate's motion may be denied without a hearing if s/he failed to show that the results of the requested DNA testing would "in reasonable probability" have led to his/her acquittal if the results had been available at the initial trial.[63] If a hearing is ordered, it must be scheduled for a date after the state has filed its response, but no later than ninety days from the date the inmate filed his/her motion.[64] The inmate's motion will be heard by the judge who conducted the trial resulting in the inmate's conviction, unless such judge is otherwise unavailable.[65] Upon the request of either party, the judge may order that the inmate be present for the hearing.[66]

---

54 O.C.G.A. § 5-5-41(c)(3) (2005).
55 O.C.G.A. § 5-5-41(c)(1) (2005).
56 O.C.G.A. § 5-5-41(c)(2) (2005).
57 O.C.G.A. § 5-5-41(c)(10) (2005).
58 O.C.G.A. § 17-5-55(c) (2005).
59 *Id*.
60 O.C.G.A. § 5-5-41(c)(5) (2005).
61 *Id.*
62 O.C.G.A. § 5-5-41(c)(6)(A) (2005); Johnson v. State, 612 S.E.2d 29, 31 (Ga. Ct. App. 2005).
63 Crawford v. State, 597 S.E.2d 403, 404 (Ga. 2004).
64 O.C.G.A. § 5-5-41(c)(6)(A) (2005).
65 O.C.G.A. § 5-5-41(c)(6)(B) (2005).
66 O.C.G.A. § 5-5-41(c)(6)(C) (2005).

During the hearing, both the state and the inmate may present evidence as to the merits of the inmate's motion.[67] This evidence may be presented by either testimony or sworn and notarized affidavits.[68] All affidavits, however, must be served on the opposing party fifteen days before the hearing.[69]

The judge's decision on the motion must be set forth in writing and include the rationale for granting or denying the inmate's motion.[70] The judge must grant the inmate's motion if s/he finds that the inmate "stated" and "showed or provided" all of the necessary information and established the following:

1. The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;
2. The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
3. The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;
4. The motion is not made for the purpose of delay;
5. The identity of the perpetrator of the crime was a significant issue in the case;
6. The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and
7. The petitioner has made a *prima facie* showing that the evidence sought to be tested is material to the issue of the [inmate's] identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.[71]

By filing an application for a discretionary appeal, either the state or the inmate may appeal the judge's decision regarding the DNA testing which was requested as part of an extraordinary motion for a new trial.[72] The state, however, may directly appeal a judge's

---

[67] O.C.G.A. § 5-5-41(c)(6)(E) (2005).
[68] O.C.G.A. § 5-5-41(c)(6)(D) (2005).
[69] *Id.*
[70] O.C.G.A. § 5-5-41(c)(12) (2005); Johnson v. State, 612 S.E.2d 29, 31 (Ga. Ct. App. 2005) (noting that the lower court did not set forth by written order its rationale for denying the motion and remanding the case to the lower court "for a determination of whether Johnson is entitled to a hearing on his motion, and for the entry of a written order setting forth the basis for either the grant or the denial of the motion").
[71] O.C.G.A. § 5-5-41(c)(7) (2005) (italics added).
[72] O.C.G.A. § 5-5-41(c)(13) (2005); Crawford v. State, 597 S.E.2d 403, 404 (Ga. 2004) (finding that an inmate is not entitled to a direct appeal of the judge's denial of his/her request for DNA testing made as part of an extraordinary motion for a new trial).

decision granting a motion for DNA testing where the motion was not filed as part of an extraordinary motion for a new trial.[73]

C. Method of and Funding for Post-Conviction DNA Testing

In cases in which the judge orders post-conviction DNA testing, the judge must determine the method of testing and the party responsible for the costs of the tests.[74] The judge may require the inmate to absorb the costs of the tests.[75] However, if the inmate is indigent, the court will pay for the tests from the state fine and forfeiture fund.[76]

D. Location of Post-Conviction DNA Testing

If the judge orders post-conviction DNA testing, the tests must be performed by a Division laboratory or by a laboratory that meets the standards of the Federal Bureau of Investigation's DNA advisory board.[77] Tests performed by the Division will be completed either at the Headquarters Laboratory in Decatur, Georgia or at one of the seven regional crime laboratories located throughout the state in the following locations:

1. Augusta ("Eastern Regional Crime Laboratory");
2. Cleveland ("Northeast Regional Crime Laboratory");
3. Midland (Columbus) ("Western Regional Crime Laboratory");
4. Dry Branch (Macon) ("Central Regional Crime Laboratory");
5. Moultrie ("Southwestern Regional Crime Laboratory");
6. Savannah ("Coastal Regional Crime Laboratory"); and
7. Trion (Summerville) ("Northwestern Regional Crime Laboratory").[78]

The judge must also order that a sample of the inmate's DNA be submitted to the Division and that the DNA analysis be "stored and maintained" by the Georgia Bureau of

---

[73] *See* State v. Clark, 615 S.E.2d 143, 144 (Ga. Ct. App. 2005) (noting that the state's right to appeal is "based on the facts and circumstances of this particular case").

[74] O.C.G.A. § 5-5-41(c)(8) (2005).

[75] *Id.*

[76] *Id.*

[77] O.C.G.A. § 5-5-41(c)(9) (2005); 42 U.S.C. § 14131(a)(1) (2005). The 1994 DNA Identification Act (codified, in part, at 42 U.S.C. § 14131(a)(1)) authorized the Federal Bureau of Investigation to establish and appoint individuals to a DNA advisory board, charged with creating standards of quality assurance for DNA testing. The "Quality Assurance Standards for Forensic DNA Testing Laboratories" became effective on October 1, 1998. *See* DNA Advisory Board, *Quality Assurance Standards for Forensic DNA Testing Laboratories,* 2 FORENSICS SCI. COMM. 3 (July 2000), *available at* http://www.fbi.gov/hq/lab/fsc/backissu/july2000/codis2a.htm (last visited on Sept. 28, 2005); *see also Clark*, 615 S.E.2d at 146-47 (finding that "the trial court erred when it ordered the state to provide the evidence to the uncertified laboratory for testing").

[78] *See* Georgia Bureau of Investigation, Division of Forensic Services, *at* www.ganet.org/gbi/fordiv.html (last visited on Sept. 28, 2005); Georgia Bureau of Investigation, Division of Forensic Services, Laboratory Services and Requirements for Submitting Evidence, *at* http://www.ganet.org/gbi/labmanual.html (last visited on Sept. 28, 2005).

Investigation in the DNA data bank.[79] For a detailed discussion of the Division's crime laboratories and the ASCLD/LAB and ISO/IEC 17025 accreditation programs, see the Crime Laboratory and Medical Examiner Section.

[79] O.C.G.A. § 5-5-41(c)(9) (2005); *see also Clark*, 615 S.E.2d at 148 (noting that the "trial court has a statutory duty to order that a sample be provided to the GBI for inclusion in the DNA data bank").

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence[80] for as long as the defendant remains incarcerated.

The State of Georgia requires all government entities in possession of any physical evidence from a criminal case to "maintain any physical evidence collected at the time of the crime that contains biological material, including, but not limited to, stains, fluids, or hair samples that relate to the identity of the perpetrator of the crime."[81] In cases in which the defendant was sentenced to death, the respective government entity must preserve all biological material until the "sentence in the case has been carried out," [82] which, as interpreted by the Georgia Supreme Court, is at the time the defendant is executed.[83] The State of Georgia, therefore, is in compliance with Recommendation #1.

It should be noted, however, that the State of Georgia did not require the preservation of biological materials until May 27, 2003,[84] and prior to that time, "the state could destroy evidence after appeals were exhausted."[85]

B. Recommendation #2

All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.

The State of Georgia provides an avenue for defendants to obtain physical evidence for DNA testing during discovery and for inmates to seek post-conviction DNA testing.

---

[80] "Biological evidence" includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. *See* INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* http://www.innocenceproject.org/docs/Model_Statute_Postconviction_DNA.pdf (last visited on Jan. 6, 2006).

[81] O.C.G.A. § 17-5-56(a) (2005).

[82] O.C.G.A. § 17-5-56(b) (2005). In cases in which the defendant is convicted of a "serious violent felony" but not sentenced to death, the state is required to preserve the biological evidence for ten years after the judgment becomes final or ten years after May 27, 2003, whichever date is later. *Id.*

[83] *See, e.g.*, Dawson v. State, 554 S.E.2d 137, 139 (Ga. 2001) (stating "any future executions of death sentences in Georgia be *carried out* by lethal injection") (emphasis added); Rhode v. State, 552 S.E.2d 855, 860 (Ga. 2001) (stating that "jurors in Georgia death penalty trials play no role in determining the method by which a death sentence is *carried out*") (emphasis added); Colwell v. State, 544 S.E.2d 120, 128 (Ga. 2001) (stating that "Colwell should be permitted to elect lethal injection instead of electrocution as the method by which his sentence is *carried out*") (emphasis added).

[84] O.C.G.A. § 17-5-56(a) (2005).

[85] Rife, *supra* note 11, at 123.

Georgia law provides that prior to a trial in which the defendant has elected to participate in "reciprocal discovery," the prosecuting attorney must allow the defendant, no later than ten days prior to trial, to "inspect and copy or photograph books, papers, . . . tangible objects . . . , which are within the possession, custody or control of the state or prosecution and are intended for use by the prosecuting attorney as evidence . . . or were obtained from or belong to the defendant. Evidence that is within the possession, custody or control of the Forensic Science Division of the Georgia Bureau of Investigation ["the Division"] or other laboratory . . . may be examined, tested, and analyzed at the facility where the evidence is being stored."[86] Based on this law, it appears that a defendant who elects to participate in reciprocal discovery has the right to examine, test, and analyze all evidence that is in the possession of the Division, including biological evidence.

Additionally, pursuant to section 5-5-41(c)(1) of the O.C.G.A., Georgia authorizes certain inmates to apply for and/or obtain post-conviction DNA testing. Section 5-5-41(c)(1) of the O.C.G.A., however, limits the pool of eligible applicants to inmates convicted of a "serious violent felony." This includes inmates convicted of one of the following offenses: murder or felony murder,[87] armed robbery,[88] kidnapping,[89] rape,[90] aggravated child molestation,[91] aggravated sodomy,[92] or aggravated sexual battery,[93] which does not include all offenses, but does include all capital offenses except aircraft hijacking[94] and treason.[95]

Section 5-5-41(c) also requires these eligible applicants to comply with a number of procedural requirements in order to request a hearing, obtain a hearing, and an order for DNA testing. In light of section 5-5-41(c) and *Clark v. State*,[96] it appears that these eligible applicants may apply for post-conviction DNA testing by requesting the testing as part of a motion for a new trial filed within thirty days of the judgment of conviction, as part of an extraordinary motion for a new trial filed any time thereafter, and/or by filing a motion requesting DNA testing separate and apart from any other motion.[97] Regardless of whether the applicant files an extraordinary motion for a new trial after obtaining DNA test results or files an extraordinary motion for a new trial to request DNA testing, all applicants are limited to one extraordinary motion for a new trial.[98] The only exception to the limit on the number of extraordinary motions is for inmates who were convicted of a "serious violent felony" before May 27, 2003, and who prior to that

---

[86] O.C.G.A. § 17-16-4 (2005).
[87] *See* O.C.G.A. § 16-5-1 (2005).
[88] *See* O.C.G.A. § 16-8-41 (2005).
[89] *See* O.C.G.A. § 16-5-40 (2005).
[90] *See* O.C.G.A. § 16-6-1 (2005).
[91] *See* O.C.G.A. § 16-6-4 (2005).
[92] *See* O.C.G.A. § 16-6-2 (2005).
[93] *See* O.C.G.A. § 16-6-22.2 (2005).
[94] O.C.G.A. § 16-5-44 (2004).
[95] O.C.G.A. § 16-11-1 (2004).
[96] *See supra* note 45 and accompanying text.
[97] *See supra* notes 44-46 and accompanying text.
[98] *See supra* note 49 and accompanying text.

date filed an extraordinary motion for a new trial within which "the issue of DNA was not raised or denied."[99] Therefore, the ability to file a motion requesting DNA testing separate and apart from any other motion allows inmates to reserve the use of their one and only extraordinary motion for a new trial until they have obtained DNA test results. But the limitations on motions requesting DNA testing filed separate and apart from any other motion (i.e., filing deadlines and the number of allowable motions) are unclear.

In addition to the limitations on extraordinary motions for a new trial, judges are not required to hold hearings on inmates' motions requesting post-conviction DNA testing. Rather, judges may grant a hearing on the motion if, and only if, the motion "states" and "shows or provides" all of the requisite information.[100] This requirement is extremely restrictive given that inmates are not provided with counsel to assist with or to draft the motion. Furthermore, it allows judges to deny motions for post-conviction DNA testing without holding a hearing to fully develop the inmate's claims. For example, in cases in which the inmate filed his/her request for DNA testing as part of an extraordinary motion for a new trial and failed to "state" and "show or provide" all of the requisite information in his/her motion, the inmate would never receive a hearing on his/her motion, as s/he would be barred from filing a second extraordinary motion for a new trial. Pursuant to *Clark*, this inmate would be able to file a motion for DNA testing separate and apart from any other motion and could potentially receive a hearing on and an order granting DNA testing, but s/he would still be barred from filing a second extraordinary motion for a new trial based on the test results.

Based on this information, the State of Georgia is only in partial compliance with Recommendation #2.

C. Recommendation #3

Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.

Georgia law requires the Division to establish standards for the "identification, collection, transportation, and analysis of forensic evidence," but this requirement does not explicitly include standards on the preservation of evidence.[101] It is impossible to state whether the Division's standards on the identification, collection, transportation, and analysis of forensic evidence address the issue of preservation of evidence, as all of the Division's standards relating to the identification, collection, transportation, and analysis of forensic evidence do not have to be "published or made available for public inspection" in order to become effective.[102] It appears, however, that certain law enforcement agencies and Division laboratories may have established or adopted procedures pertaining to the

---

[99] 2003 Ga. Laws 37, § 5.
[100] *See supra* note 62 and accompanying text.
[101] O.C.G.A. § 35-3-151(3) (2004).
[102] O.C.G.A. § 35-3-155 (2004).

preservation of biological evidence in order to obtain accreditation and/or comply with model operating procedures.

Both CALEA and GLECP require certified law enforcement agencies to adopt a written directive establishing procedures to be used in criminal investigations, including procedures on the collection, preservation, and use of physical evidence.[103] Similarly, all of the Division's crime laboratories accredited by the ASCLD/LAB and/or the ISO/IEC 17025 are required to adopt specific procedures relating to the preservation of evidence.[104] The MLEOM and SLEOM also provide model standards on the collection and preservation of evidence, but the extent to which Georgia law enforcement agencies have adopted either MLEOM or SLEOM is unknown.

Although it appears that certified police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments and crime laboratories in Georgia may have adopted procedures on the preservation of evidence, we were unable to confirm the existence of these procedures or obtain information to assess whether the procedures adopted by these agencies and crime laboratories and all other Georgia law enforcement agencies comply with Recommendation #3.

D. Recommendation #4

Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.

Georgia statutory law mandates that every law enforcement officer complete a basic training course offered at a POST Council-certified academy,[105] which includes instruction on the proper methods for collecting, packaging, and identifying trace materials, fingernail scrapings, hair, and other biological evidence, such as blood and bodily fluids, in order to prevent contamination.[106]

Additionally, police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Georgia certified under CALEA and/or GLECP are required to establish written directives requiring a training program[107] and an annual, documented performance evaluation of each

---

[103] CALEA Online, The Standards, *at* http://www.calea.org/newweb/accreditation%20Info/standards.htm (last visited on Sept. 23, 2005).

[104] ASCLD/LAB 2003 Manual, *supra* note 35, at 20-23; FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS, *supra* note 37, at 37 (Standard 5.8.1).

[105] O.C.G.A. §§ 35-8-9(a), -11 (2005).

[106] POST COUNCIL BASIC TRAINING COURSE, *supra* note 31, at 5.2-26 to -29, -33 to -37, -42, -44 to -46.

[107] CALEA STANDARDS, *supra* note 21, at 33-3 to 33-4 (Standards 33.4.1, 33.4.2); GLECP STANDARDS, *supra* note 20, at 4 (Standard 1.11).

employee.[108] Similarly, the MLEOM and SLEOM contain procedures on the establishment of training programs[109] and guidelines on disciplinary procedures,[110] but the extent to which Georgia law enforcement agencies have adopted MLEOM or SLEOM is unknown.

Similarly, all of the Division crime laboratories that are accredited by ASCLD/LAB and/or possess ISO/IEC 17025 accreditation are required to create training programs relevant to the tasks required of the laboratory personnel.[111] A review of the Division's annual reports indicates that the Division provides training programs for new examiners to ensure that they possess the necessary knowledge and skills to perform the required tasks.[112]

Based on this information, it appears that law enforcement investigative personnel do receive mandatory basic training on proper techniques for the collection, packaging, and identification of different types of evidence. Furthermore, certified law enforcement agencies and crime laboratories and agencies that have adopted MLEOM or SLEOM may have training programs and/or disciplinary procedures. However, the extent to which the basic training course, certification programs, and standard operating procedures comply with Recommendation #4 by ensuring that investigative personnel are prepared and accountable for their performances is unknown. Georgia, therefore, is only in partial compliance with Recommendation #4.

---

[108] CALEA STANDARDS, *supra* note 21, at 35-1 (Standard 35.1.2); GLECP STANDARDS, *supra* note 20, at 14 (Standard 3.7).

[109] MLEOM, *supra* note 24, at 4-1.

[110] *Id.* at 6.

[111] ASCLD/LAB 2003 MANUAL, *supra* note 35, at 19, app. 1; FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS, *supra* note 37, at 24.

[112] *See e.g.*, GA. BUREAU OF INVESTIGATION, DIVISION OF FORENSIC SCIENCES, 1999 ANNUAL REPORT, *at* http://www.ganet.org/gbi/99annual/99ar_dofs.html (last visited on Oct. 5, 2005) (stating "[a] training plan was developed that allowed support staff, such as laboratory assistants, evidence receiving technicians and forensic pathologists, to come on board and begin working within 30 days of hire. The training programs for scientists were lengthier—four months for toxicologists and three months for chemists."); GA. BUREAU OF INVESTIGATION, DIVISION OF FORENSIC SCIENCES, 2000 ANNUAL REPORT, *at* http://www.ganet.org/gbi/00annual/00ar_dofs.html (last visited on Oct. 5, 2005) (indicating that after completing the three to four months of training, the scientists "successfully completed the necessary knowledge, skills and abilities requirements to perform complex scientific testing and courtroom testimony"); GA. BUREAU OF INVESTIGATION, DIVISION OF FORENSIC SCIENCES, 2001 ANNUAL REPORT, *at* http://www.ganet.org/gbi/01annual/01ar_dofs.html (last visited on Oct. 5, 2005); GA. BUREAU OF INVESTIGATION, DIVISION OF FORENSIC SCIENCES, 2002 ANNUAL REPORT, *at* http://www.ganet.org/gbi/02annual/DOFS_FY02.pdf (last visited on Oct. 5, 2005) (stating "[d]uring FY'01, additional instruction was given to the scientists to complete training in their respective fields of forensic science").

E. Recommendation #5

Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Georgia certified under CALEA and/or GLECP are required to establish written directives requiring written investigative procedures for all complaints against the agency and/or its employees.[113] It appears, therefore, that certified law enforcement agencies may have adopted written directives governing complaints against the agency and/or its employees, but the extent to which these procedures comply with Recommendation #5 is unknown.

F. Recommendation #6

Provide adequate funding to ensure the proper preservation and testing of biological evidence.

The amount of funding dedicated to the preservation and testing of biological evidence is unknown, making it impossible to assess the adequacy of the funding. However, it appears that the costs associated with storing evidence may be absorbed by the agency designated by the court to store the evidence. The court also has the discretion to determine which party, either the inmate or the state, is responsible for paying for the post-conviction DNA testing.[114] The inmate may be required to absorb the costs of the test, regardless of where the test is conducted, as long as the inmate is not indigent.[115] If the inmate is indigent, the court is responsible for paying for the test from the state fine and forfeiture fund.[116] Even though we are aware of which agency or party may be responsible for absorbing the costs associated with storing and testing DNA evidence, it remains unclear whether the State of Georgia provides adequate funding to ensure the proper preservation and testing of DNA evidence.

---

[113] CALEA STANDARDS, *supra* note 21, at 52-1 (Standard 52.1.1); GLECP STANDARDS, *supra* note 20, at 10 (Standard 2.7).
[114] *See supra* notes 74-76 and accompanying text.
[115] *Id.*
[116] *Id.*

CHAPTER THREE

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1983 and 2003, approximately 199 previously convicted "murderers" were exonerated nationwide.[1] In about 50% of these cases, there was at least one eyewitness misidentification, and 21% involved false confessions.[2]

Lineups and Showups

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification. To avoid misidentification, the group should include foils who resemble the suspect, and the administering officer should be unaware of the suspect's identity. Caution in administering lineups and show-ups is especially important because flaws can easily taint later lineup and at-trial identifications.[3]

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the witness simultaneously.[4] In the sequential approach, the witness views one person at a time and is not told how many s/he will see.[5] As each person is presented, the eyewitness states whether or not it is the perpetrator.[6] Once an identification is made in a sequential procedure, the procedure stops.[7] The witness thus is encouraged to compare the features of each person viewed to the witness' recollection of the perpetrator rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the "best match."

Law enforcement agencies also should videotape or digitally record identification procedures, including the witness' statement regarding his/her degree of confidence in the identification. In the absence of a videotape or digital recorder, law enforcement agencies should photograph and prepare a detailed report of the identification procedure.

---

[1] *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003* (2004), *available at* http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf (last visited on Jan. 6, 2006).
[2] *See id.*
[3] *See* BRYAN CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESSES 13-17, 42-44 (2002).
[4] *Id.* at 39.
[5] *Id.*.
[6] *Id.*
[7] *Id.*

Audio or Videotaping of Custodial Interrogations

Electronically recording interrogations from their outset—not just from when the suspect has agreed to confess—can help avoid erroneous convictions. Complete recording is on the increase in this country and around the world. Those police departments who make complete recordings have found the practice beneficial to law enforcement.[8]

Complete recording may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

---

[8] *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

I. FACTUAL DISCUSSION

The State of Georgia does not require law enforcement agencies to adopt special procedures on identifications and interrogations. However, it does require all law enforcement officials to take a basic training course, regulated by the Georgia Peace Officer Standards and Training Council. Moreover, the Georgia Association of Chiefs of Police has adopted the Sample Law Enforcement Operations Manual, which is derived from the Model Law Enforcement Operations Manual authored by the Georgia Department of Community Affairs. This Section will discuss the requirements of the basic training course and the standard procedures contained in the Sample Law Enforcement Operations Manual and the Model Law Enforcement Operations Manual. Additionally, this Section will discuss the standards with which law enforcement agencies must comply to obtain certification by the Georgia Law Enforcement Certification Program and national accreditation by the Commission on Accreditation for Law Enforcement Agencies. Lastly, given that Georgia case law governs all pre-trial identifications and interrogations, this Section will also discuss judicial determinations of the propriety of certain law enforcement actions.

A. Georgia Peace Officer Standards and Training Council

The Georgia Peace Officer Standards and Training Council (POST Council) is the regulatory body authorized by the legislature to, among other things, (1) certify academies as authorized to conduct basic and specialized training of law enforcement personnel; (2) prescribe minimum qualifications for certification of academy directors and instructors; (3) reevaluate the certifications of academies, and suspend academies, directors, and instructors who fail to maintain minimum qualifications for certification; (4) determine whether candidates have met the qualifications for employment as a peace officer, and grant or deny certification based on that determination; (5) establish and modify the curriculum and minimum number of hours for the basic training course and establish the curriculum for any advanced instruction deemed advisable by the Council; and (6) adopt such rules and regulations as are necessary to carry out these and other legislatively authorized duties.[9]

A "peace officer" is defined, for the purposes of this Section, as "[a]n agent, operative, or officer of this state, a subdivision or municipality thereof, . . . who, as an employee for hire or as a volunteer, is vested either expressly by law or by virtue of public employment or service with authority to enforce the criminal or traffic laws through the power of arrest and whose duties include the preservation of public order, the protection of life and property, and the prevention, detection, or investigation of crime."[10] To obtain

---

[9] O.C.G.A. § 35-8-7 (2005). The POST Council consists of nineteen voting members and five advisory members. O.C.G.A. § 35-8-3(a) (2005).

[10] O.C.G.A. § 35-8-2(8)(A) (2005). There are, however, other law enforcement officials included in the definition of a "peace officer" that are not relevant to this discussion, such as (1) an enforcement officer employed by the Department of Transportation in its Office of Permits and Enforcement; (2) any person

certification as a peace officer, one must normally meet certain criteria[11] and complete a statutorily required basic training course[12] at a POST Council-certified academy,[13] unless the candidate has received other instruction that the POST Council deems equivalent to that which is taught in the POST Council basic training course.[14]

The POST Council provides law enforcement academies with a mandatory curriculum for the basic training course that consists of 404 hours of instruction, including eight hours of training on interviews and interrogations.[15] In addition to providing instruction on obtaining voluntary confessions from suspects, the chapter on interviews and interrogations provides in-depth training on the time, duration, and setting of a witness interview and techniques for conducting a good interview and for avoiding a bad interview.[16]

---

employed by the Department of Juvenile Justice who is designated by the commissioner to investigate and apprehend unruly and delinquent children; (3) personnel who are authorized to exercise the power of arrest, who are employed or appointed by the Department of Juvenile Justice, and whose full-time duties include the preservation of public order, the protection of life and property, the detection of crime, or the supervision of delinquent and unruly children in the department's institutions, facilities, or programs; (4) personnel who are authorized to exercise the power of arrest and who are employed or appointed by the Department of Corrections, the State Board of Pardons and Paroles, municipal correctional institutions employing 300 or more correctional officers, county probation systems, and county correctional institutions; and (5) an administrative investigator who is an agent, operative, investigator, or officer of this state whose duties include the prevention, detection, and investigation of violations of law and the enforcement of administrative, regulatory, licensing, or certification requirements of his/her respective employing agency.

[11] *See* O.C.G.A. § 35-8-8(a) (2005). Accordingly, a peace officer must (1) be at least 18 years of age; (2) be a citizen of the United States; (3) have obtained a high school diploma or the recognized equivalent; (4) not have been convicted of any state or federal felonies or sufficient misdemeanors to establish a pattern of disregard for the law; (5) be fingerprinted for a background check; (6) possess good moral character; (7) complete an oral interview; (8) be found free from an adverse physical, emotional, or mental condition; and (9) successfully complete the basic training course entrance examination. *See also* GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL R. 464-3-.02(1), (2), *available at* http://www.gapost.org/5Trng.htm (last visited on Nov. 1, 2005) (delineating the requisite criteria for U.S. citizens and non-citizens to obtain certification as a peace officer).

[12] O.C.G.A. § 35-8-9(a), (b) (2005); GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL R. 464-3-.03, *available at* http://www.gapost.org/5Trng.htm (last visited on Nov. 1, 2005).

[13] O.C.G.A. § 35-8-11 (2005).

[14] O.C.G.A. § 35-8-9(b) (2005).

[15] *See* GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, 404 HOUR BASIC LAW ENFORCEMENT TRAINING COURSE (11th ed. 2003) (table of contents), *available at* http://www.gapost.org/pdf_file/bletc404.pdf (last visited on Nov. 1, 2005). The curriculum for this training course is the minimum level of instruction and training for law enforcement officials required to be taught at POST Council-certified training academies. Based on the course's table of contents and a review of certain sections of course curriculum related to interviews and interrogations, this basic training course does not appear to include any instruction on conducting pre-trial identification procedures. *See id.*; GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, 404 HOUR BASIC LAW ENFORCEMENT TRAINING COURSE 4.5-1 (11th ed. 2003) [hereinafter POST COUNCIL BASIC TRAINING COURSE]; *see also* O.C.G.A. § 35-8-5(15) (2005).

[16] POST COUNCIL BASIC TRAINING COURSE, *supra* note 15, at 4.5-3 to -10.

1. Timing, Duration, and Setting of a Witness Interview

Non-suspect witnesses should generally be interviewed "as soon as possible while details are fresh and cooperation is most likely," and interviews should be scheduled with the "least necessary intrusion" upon the normal lives of witnesses.[17] Trainees are instructed that an interview should "take as long as it takes," in order to build a rapport with the witness and to ensure accurate results.[18] An interview should be conducted in a setting that is physically comfortable for both the officer and the witness, and which provides privacy to facilitate openness on the part of the witness.[19] For example, non-suspect interviews should be arranged at the home or business of the witness, or in the law enforcement station in a private room.[20] A proper interview setting should be properly heated, cooled, and ventilated, and away from noisy distractions.[21]

2. Techniques for Conducting a Good Interview and Avoiding a Bad Interview

At the beginning of the interview, the officer should identify himself/herself in a friendly manner and even exchange a few pleasantries in order to relax the witness and to develop rapport with the witness.[22] An officer must "[n]ever be sarcastic or rude" to the witness.[23] The curriculum suggests that the officer should attempt to motivate the witness to answer questions by determining the reason for a witness' reluctance to cooperate and by appealing to his/her sense of justice, rather than threatening consequences for lack of cooperation.[24] Officers should keep the witness talking by not interrupting or criticizing the witness, and by asking open-ended questions that generate narrative responses.[25] The use of leading or yes/no questions during an interview, as well as specific questions at an interview's onset, can lead to incomplete, inaccurate or vague responses from the witness and should be avoided.[26]

3. Video or Audio-Taping the Entire Interview or Interrogation

The POST Council requires at least written recording of the interview or interrogation, including the warning, waiver, and circumstances of the interview/interrogation and

---

[17] *Id.* at 4.5-3.
[18] *Id.*
[19] *Id.* at 4.5-4 (noting that interviews should not be conducted in noisy places as it may lead to confusion of facts).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 4.5-5 to -6.
[23] *Id.* at 4.5-5.
[24] *Id.* at 4.5-6.
[25] *Id.* at 4.5-6 to -7.
[26] *Id.* at 4.5-7.

suggests that "video or audio-taping [of] the entire interview in addition to or in place of professional stenographic services" is acceptable.[27]

B. *Georgia Model Law Enforcement Operations Manual and Sample Law Enforcement Operations Manual*

The Model Law Enforcement Operations Manual (MLEOM) was developed by the Georgia Department of Community Affairs as a comprehensive document identifying "professional standards and requirements for law enforcement operations."[28] The Department of Community Affairs suggests that the MLEOM be used by law enforcement agencies to develop and/or revise their own policies and procedures manuals, in order to keep current with service demands, procedural changes, and new statutory and case law.[29] Thus, the adoption of the MLEOM by individual law enforcement agencies is not mandatory. It appears that the Georgia Association of Chiefs of Police has adopted the MLEOM as its own Sample Law Enforcement Operations Manual (SLEOM).[30]

Chapter 17 of the SLEOM deals with "investigative functions" and consists of specific Standard Operating Procedures on actions law enforcement officials should do and avoid when conducting lineups, photo arrays, and showups.[31] Chapter 8-3 of the MLEOM and SLEOM consists of Standard Operating Procedures relating to "confessions and interrogations."[32] The following Parts will discuss these specific Standard Operating Procedures in detail.

---

[27] *Id.* at 4.5-18 (noting that a written record should still be made in case the electronic record is destroyed).

[28] GA. DEP'T OF CMTY. AFFAIRS, MODEL LAW ENFORCEMENT OPERATIONS MANUAL (6th ed. 1996) (acknowledgment), *available at* http://www.dca.state.ga.us/development/research/programs/downloads/law/ackn.html (last visited on Nov. 7, 2005).

[29] *Id.*

[30] *See* GA. ASS'N OF CHIEFS OF POLICE, SAMPLE LAW ENFORCEMENT OPERATIONS MANUAL [hereinafter SLEOM], *available at* http://www.gachiefs.com/statecertification/LawEnforcementOperationManual.html (last visited on Nov. 7, 2005). It appears that the SLEOM is exactly the same as the MLEOM. When discussing, however, the Standard Operating Procedures regarding line-ups, photo arrays, and show-ups, we only refer to Chapter 17 of the SLEOM because the same chapter of the MLEOM is not accessible on the website of the Georgia Department of Community Affairs.

[31] *Id.* at 17-27, *available at* http://www.gachiefs.com/statecertification/Sample%20LE%20Manual/SCHAPTER17.doc (last visited on Nov. 16, 2005).

[32] GA. DEP'T OF CMTY. AFFAIRS, MODEL LAW ENFORCEMENT OPERATIONS MANUAL 8-16 [hereinafter MLEOM] (Standard Operating Procedure 8-3), *available at* http://www.dca.state.ga.us/development/research/programs/downloads/law/Law.html (last visited on Jan. 9, 2006); SLEOM, *supra* note 30, at 8-16 (Standard Operating Procedure 8-3).

1. The SLEOM on Lineups

Standard Operating Procedure 17-9 states that a law enforcement official in charge of conducting the lineup should (1) advise the suspect that s/he may stand at any position in the lineup that s/he prefers; (2) "ensure that all participants in the lineup are numbered consecutively and are referred to only by number;" (3) "ensure that a complete written record and videotape recording of the lineup proceedings is made and retained;" (4) "ensure that witnesses are not permitted to see nor are they shown any photographs of the [suspect] immediately prior to the lineup;" (5) "ensure that not more than one witness views the lineup at a time and that they are not permitted to speak with one another during lineup proceedings;" and (6) "scrupulously avoid using statements, clues, casual comments or providing unnecessary or irrelevant information that in any manner may influence the witnesses' decision-making process or perception."[33] Standard Operating Procedure 17-9 also suggests that "four to six other persons act as 'fill ins' at the lineup who are the same race, sex and approximate height, weight, age and physical appearance and who are similarly clothed."[34]

2. The SLEOM on Photo Arrays

Standard Operating Procedure 17-9 suggests that those conducting photographic identifications "must use multiple photographs shown individually to a witness or simultaneously in a book or array."[35] Furthermore, those conducting photo arrays should generally abide by certain principles, similar to those used when conducting lineups. These principles include (1) "us[ing] at least six photographs of individuals who are reasonably similar in age, height, weight and general appearance and of the same sex and race;" (2) "whenever possible, avoid[ing] mixing color and black and white photos;" (3) us[ing] photos of the same size and basic composition, (4) "never mix[ing] mug shots with other snapshots;" (5) "never includ[ing] more than one photo of the same suspect;" (6) "cover[ing] any portions of mug shots or other photographs that provide identifying information on the subject;" (7) "show[ing] the photo array to only one witness at a time;" (8) "never mak[ing] suggestive statements that may influence the judgment or perception of the witness;" and (9) "preserving the photo array, together with full information about the identification process, for future reference."[36]

---

[33] SLEOM, *supra* note 30, at 17-29 (Standard Operating Procedure 17-9). Chapter 17 also notes that the officer in charge of the pre-trial procedure should inform the suspect of his/her right to counsel, obtain a waiver, and, if no waiver is given, allow the suspect time to confer with counsel and allow counsel to observe the procedure. *Id.*

[34] *Id.*

[35] *Id.* at 17-28.

[36] *Id.*

3. The SLEOM on Showups

Standard Operating Procedure 17-9 defines a showup as "the presentation of one suspect to an eyewitness in a short time frame following commission of a crime."[37] The Standard Operating Procedure notes that because of the "inherent suggestiveness" of the showup, its use "should be avoided whenever possible in preference for the use of a lineup."[38] However, when exigent circumstances require the use of showups, the Standard Operating Procedure states that (1) it "should not be conducted when the suspect is in a cell, manacled or dressed in jail clothing;" (2) it "should not be conducted with more than one witness;" (3) "the witnesses should not be permitted to communicate before or after the showup regarding the identification of the suspect;" (4) "[t]he same suspect should not be presented to the same witness more than once;" (5) "[s]howup suspects should not be required to put on clothing worn by the perpetrator, to speak words uttered by the perpetrator or to perform other actions of the perpetrator;" and (6) "[w]ords or conduct of any type by officers that may suggest to the witness that the individual is or may be the perpetrator should be scrupulously avoided."[39]

4. The MLEOM and SLEOM on Documenting Confessions and Interrogations

Standard Operating Procedure 8-3 states that "[w]henever possible, any statement made by the accused should be recorded on either audio or video tape . . . includ[ing] the accused's waiver of rights at both the beginning and end of the tape."[40] The procedure also requires the inclusion of a transcript of all recorded statements in the case file.[41] If it is not possible to record the accused's statement, "the officer must fully document the content of the statement."[42]

C. Law Enforcement Accreditation Programs

1. Commission on Accreditation for Law Enforcement Agencies, Inc.

Forty-two[43] police departments, sheriff departments, state law enforcement agencies, transportation police departments, and university police departments in Georgia have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), which is an independent

---

[37] *Id.* at 17-27.
[38] *Id.*
[39] *Id.* at 17-27 to -28.
[40] MLEOM, *supra* note 32, at 8-16 (Standard Operating Procedure 8-3); SLEOM, *supra* note 30, at 8-16 (Standard Operating Procedure 8-3).
[41] MLEOM, *supra* note 32, at 8-16 (Standard Operating Procedure 8-3); SLEOM, *supra* note 30, at 8-16 (Standard Operating Procedure 8-3).
[42] MLEOM, *supra* note 32, at 8-16 (Standard Operating Procedure 8-3); SLEOM, *supra* note 30, at 8-16 (Standard Operating Procedure 8-3).
[43] CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited on Nov. 3, 2005) (using second search function and designating "U.S." and "Georgia" as search criteria).

accrediting authority established by the four major law enforcement membership associations in the United States.[44]

To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; and (5) participating in an on-site assessment by a team selected by the Commission to determine compliance who will submit a compliance report to the Commission.[45] After completion of these steps, a hearing is held where a final decision on accreditation is rendered.[46] The CALEA standards are used to "certify various functional components within a law enforcement agency—Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training."[47] CALEA Standard 42.2.3 requires the creation of a written directive that "establishes steps to be followed in conducting follow-up investigations . . . [including] identifying and apprehending suspects."[48]

2. Georgia's Law Enforcement Certification Program

The Georgia Association of Chiefs of Police established the Law Enforcement Certification Program (GLECP) in 1997 as a stepping-stone to national accreditation under CALEA's Standards for Law Enforcement Agencies.[49] This program is endorsed by the State of Georgia.[50] Ninety police, sheriff, state law enforcement, transportation police, and university police departments in Georgia have obtained certification under these standards,[51] thirty-three of which also are accredited or in the process of obtaining accreditation under the CALEA Standards for Law Enforcement Agencies.[52]

---

[44] CALEA Online, About CALEA, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited on Nov. 3, 2005) (noting that the Commission was established by the International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs' Association (NSA), and Police Executive Research Forum (PERF)).

[45] CALEA Online, The Accreditation Process, *at* http://www.calea.org/newweb/accreditation%20Info/process1.htm (last visited on Nov. 3, 2005).

[46] *Id.*

[47] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4th ed. 2001) [hereinafter CALEA STANDARDS].

[48] *Id.* at 42-3 (Standard 42.2.3).

[49] GEORGIA LAW ENFORCEMENT CERTIFICATION PROGRAM: STANDARDS MANUAL (3d ed. 2002) [hereinafter GLECP STANDARDS] (introduction).

[50] *Id.*

[51] Ga. Ass'n of Chiefs of Police, State Certified Agencies, *at* http://www.gachiefs.com/statecertification/StateCertifiedAgencies.html (last visited on Nov. 16, 2005).

[52] *See* CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited on Nov. 3, 2005) (using second search function and designating "U.S." and "Georgia" as search criteria).

The GLECP standards "reflect the best professional requirements and practices for a law enforcement agency," and they "provide a description of 'what' must be accomplished by the agency but allow[] that agency latitude in determining 'how' it will achieve its compliance with each applicable standard."[53] Obtaining certification by the GLECP is a six-step process consisting of (1) application; (2) policy development; (3) assessment of compliance with the standards; (4) joint committee review; (5) awards ceremony; and (6) monitoring compliance.[54]

The GLECP standards, mirroring some of the CALEA standards related to identifications and interrogations, include requirements that law enforcement agencies establish written directives addressing (1) confessions and admissions,[55] (2) interviews with witnesses during preliminary investigations,[56] (3) identifications of suspects and follow-up interrogations,[57] and (4) the scheduling of lineups for witnesses.[58]

D. Constitutional Standards Relevant to Identifications and Interrogations

Pre-trial witness identifications, such as those taking place during lineups, showups, and photo arrays, are governed by the constitutional due process guarantee of a fair trial.[59] A due process violation occurs where the trial court allows testimony concerning pre-trial identification of the defendant if (1) the identification procedure employed by law enforcement was impermissibly suggestive,[60] and (2) under the totality of the circumstances,[61] the suggestiveness gave rise to a very substantial likelihood of irreparable misidentification.[62]

---

[53] GLECP STANDARDS, *supra* note 49.

[54] Ga. Ass'n of Chiefs of Police, State Certification Program, *at* http://www.gachiefs.com/statecertification/StateCertProgramDetailsTEMP.htm (last visited on Nov. 16, 2005).

[55] GLECP STANDARDS, *supra* note 49, at 18 (Standard 4.2(a)).

[56] *Id.* at 30 (Standard 5.20).

[57] *Id.* at 30-31 (Standard 5.21).

[58] *Id.* at 45 (Standard 6.12).

[59] *See* Neil v. Biggers, 409 U.S. 188, 196-99 (1972); Heyward v. State, 224 S.E.2d 383, 384 (Ga. 1976).

[60] *Neil*, 409 U.S. at 196-97; Clark v. State, 515 S.E.2d 155, 161 (Ga. 1999).

[61] *Neil*, 409 U.S. at 196 (noting that whether the impermissible suggestiveness of a pre-trial identification gave rise to a very substantial likelihood of misidentification must be "determined 'on the totality of the circumstances'"); *Clark*, 515 S.E.2d at 161; Miller v. State, 512 S.E.2d 272, 274 (Ga. 1999); Heng v. State, 554 S.E.2d 243, 246 (Ga. Ct. App. 2001); Pack v. State, 356 S.E.2d 557, 558 (Ga. Ct. App. 1987) (noting that a "claimed violation of due process of law in the conduct of pre-trial confrontations depends on the totality of the circumstances").

[62] The U.S. Supreme Court and the Georgia Court of Appeals have stated that, for testimony regarding the pre-trial procedure to be excluded, its impermissible suggestiveness should give rise to a very substantial likelihood of "irreparable" misidentification. *See, e.g.*, *Neil*, 409 U.S. at 196-97; Simmons v. United States, 390 U.S. 377, 384 (1968); Felder v. State, 579 S.E.2d 28, 33 (Ga. Ct. App. 2003); Turner v. State, 575 S.E.2d 727, 730 (Ga. Ct. App. 2002); *Heng*, 554 S.E.2d at 246-47; Brodes v. State, 551 S.E.2d 757, 759 (Ga. Ct. App. 2001); Randolph v. State, 538 S.E.2d 139, 145 (Ga. Ct. App. 2000); Jackson v. State, 531 S.E.2d 747, 751 (Ga. Ct. App. 2000); Selbo v. State, 368 S.E.2d 548, 550 (Ga. Ct. App. 1988); *Pack*, 356 S.E.2d at 559. However, the Georgia Supreme Court uses this standard, citing to *Neil*, without including the word "irreparable" and without providing an explanation for such omission. *See, e.g.*, *Clark*,

A pre-trial identification procedure is impermissibly suggestive when it leads the witness to an "all but inevitable identification" of the defendant as the perpetrator of the offense,[63] or is the equivalent of law enforcement telling the witness "this is our suspect."[64] Any alleged "taint which renders an identification procedure impermissibly suggestive must [stem] from the method used in the identification procedure," rather than from other factors that affect the credibility of the witness.[65]

A court need only consider whether there was a very substantial likelihood of irreparable misidentification if it first determines that the pre-trial identification procedures used by law enforcement were impermissibly suggestive.[66] In making the determination of whether, under the totality of the circumstances, the use of an impermissibly suggestive pre-trial identification procedure would lead to a very substantial likelihood of irreparable misidentification, the court should consider the following factors: "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation."[67] Absent a substantial likelihood of

---

515 S.E.2d at 161; *Miller*, 512 S.E.2d at 274. This may best be explained by a remark in *Neil* where the U.S. Supreme Court stated that "[w]hile the [very substantial likelihood of irreparable misidentification] . . . standard . . . determin[es] whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of the word "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." *Neil*, 409 U.S. at 198. Both litigants in *Clark* and *Miller* seem only to be challenging the actual pre-trial procedure rather than the in-court identification based on the pre-trial procedure. *Clark*, 515 S.E.2d at 161; *Miller*, 512 S.E.2d at 274. Regardless of what appears to be separate standards for challenges to pre-trial identifications and in-court identifications based on pre-trial identifications, Georgia courts have also applied the more stringent "very substantial likelihood of *irreparable* misidentification" standard in cases challenging in-court eyewitness identification relying on, and allegedly tainted by, previous pre-trial identification procedures. *See, e.g.*, *Turner*, 575 S.E.2d at 730.

[63] *Clark*, 515 S.E.2d at 161 (citing Brewer v. State, 463 S.E.2d 906, 911 (Ga. Ct. App. 1995)); *Miller*, 512 S.E.2d at 274 (citing *Brewer*, 463 S.E. 2d at 911).

[64] *Clark*, 515 S.E.2d at 161; *see also Heyward*, 224 S.E.2d at 384-85 (stating instead "[t]his is the man").

[65] *Clark*, 515 S.E.2d at 161 (citing Sherman v. State, 485 S.E.2d 557 (1997)).

[66] *Miller*, 512 S.E.2d at 274.

[67] *Heyward*, 224 S.E.2d at 385 (considering that (1) the witnesses had the time and proper lighting to view the perpetrator at the time of the crime, (2) the witnesses, as the victims, were fully aware of the assailants, (3) the prior descriptions of the perpetrator by the witnesses were general and attributed more weight to the defendant than was accurate, (4) three witnesses were certain of their pre-trial identifications and that certainty remained at trial, and (5) less than a week elapsed between the robbery and the lineup, there was not a substantial likelihood of misidentification from the employed lineup under the totality of the circumstances); *see also* Smith v. State, 222 S.E.2d 357, 360 (Ga. 1976) (even assuming that the lineup was suggestive, the facts that the witness had five minutes to view the assailant in a well-lit room before her abduction, she provided police with a "fairly detailed" description of the assailant, and she immediately and unequivocally identified the defendant upon seeing the lineup, eliminated any substantial likelihood of misidentification); *Heng*, 554 S.E.2d at 246-47 (finding that the facts that the witness looked right into the defendant's eyes and responded to his orders during the crime, that the witness did not remember the defendant wearing orange in the lineup, and that the identification occurred the day after the robbery removed any substantial likelihood that the impermissibly suggestive lineup would lead to irreparable

irreparable misidentification, pre-trial identification evidence is for the jury to weigh, even if the procedure was impermissibly suggestive.[68]

Even where there has been a tainted pre-trial identification procedure, an in-court identification is not constitutionally inadmissible if the witness has sufficient independent basis for the in-court identification, rather than pure reliance on the suggestive pre-trial procedure.[69]

---

misidentification); *Randolph*, 538 S.E.2d at 145 (concluding that the facts that (1) the witness looked into the perpetrator's eyes during the entire robbery, despite the fact that the perpetrator was wearing a mask, (2) the witness ran out the back door and saw the perpetrator take off his mask in the getaway car, (3) the witness was 100 percent sure of his identification, and (4) the witness identified the defendant during the lineup in about four seconds, led to a finding that there was no substantial likelihood of irreparable misidentification, assuming any impermissible suggestiveness); Anderson v. State, 519 S.E.2d 463, 472 (Ga. Ct. App. 1999) (holding that even if the lineup was so impermissibly suggestive, the fact that eight witnesses identified the defendant as the perpetrator "through other means than the physical lineup indicates that there was no irreparable misidentification"); McCoy v. State, 378 S.E.2d 888, 890-91 (Ga. Ct. App. 1989) (holding that there was no substantial likelihood of irreparable misidentification due to the facts that (1) the crime happened during the day and the witness saw the perpetrator and conversed with him, (2) the witness described events in detail and described the perpetrator's clothing accurately, (3) the witness identified the perpetrator "without exhibiting any hesitation or doubt," and (4) there was an "unusually short period of time" between the crime and identification); Pack v. State, 356 S.E.2d 557, 558 (Ga. Ct. App. 1987) (finding no substantial likelihood of irreparable misidentification).

[68] *See Pack*, 356 S.E.2d at 558.

[69] *See* Turner v. State, 575 S.E.2d 727, 730 (Ga. Ct. App. 2002) (holding that even if the pre-trial photo array was impermissibly suggestive, the in-court identification was otherwise admissible because the witness testified that she identified the defendants as the perpetrators based on her own observations and recollections of their faces from the robbery); *Rivers*, 484 S.E.2d at 523; *McCoy*, 378 S.E.2d at 891; Selbo v. State, 368 S.E.2d 548, 550 (Ga. Ct. App. 1988) (holding that the witness's in-court identification had such independent origin, in that he observed the defendant at the scene of the crime and provided a composite sketch, only three hours after the incident, that was almost identical to the defendant's photo shown in the array a week later); *Pack*, 356 S.E.2d at 559 (holding that the in-court identification was clearly independent of the pre-trial photographic lineup).

II. ANALYSIS

A. Recommendation #1

Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (which has been reproduced below, in relevant part and with slight modifications).

A number of law enforcement agencies in Georgia have obtained certification by either or both CALEA and the GLECP. These programs, however, do not require the certified agencies to adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. In fact, the GLECP standards recognize that they merely provide a "description of 'what' must be accomplished by the agency but allow[] that agency latitude in determining 'how' it will achieve its compliance with each applicable standard."[70] For example, Standard 5.21 of the GLECP and Standard 42.2.3 of CALEA merely require law enforcement agencies to create a written directive that "establishes steps to be followed in conducting follow-up investigations," including identifying suspects.[71]

While an individual law enforcement agency could create specific guidelines that mirror the requirements of the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (ABA Best Practices) in order to comply with Standard 5.21 of the GLECP or Standard 42.2.3 of CALEA, we were unable to obtain sufficient information to ascertain whether Georgia law enforcement agencies, certified or otherwise, are in compliance with the ABA Best Practices.

Additionally, Standard Operating Procedure 17-9 of the SLEOM suggests a number of specific actions to be taken and avoided by law enforcement officials while conducting pre-trial identification procedures. While these actions are specific and responsive to the following ABA Best Practices, adoption of the SLEOM by individual law enforcement agencies is not mandatory and we were unable to ascertain to what extent law enforcement agencies in Georgia have adopted Standard Operating Procedure 17-9 of the SLEOM.

Regardless of whether the law enforcement agency has obtained certification or has adopted any sample standard operating procedures, all pre-trial identification procedures administered by law enforcement agencies are ultimately subject to constitutional due process limitations. Thus, in assessing compliance with each ABA

---

[70] GLECP STANDARDS, *supra* note 49.
[71] *Id.* at 30-31.

Best Practice, it is also necessary to discuss the Georgia courts' treatment of certain actions by law enforcement officials in administering pre-trial identification procedures.

1. General Guidelines for Administering Lineups and Photospreads

a. The guidelines should require, whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally required) should be unaware of which of the participants is the suspect.

Numerous law enforcement agencies in Georgia are certified by the GLECP and/or CALEA, which require these agencies to create a written directive that "establishes steps to be followed in conducting follow-up investigations," including identifying suspects.[72] Although the GLECP and CALEA standards do not specifically require that all those present at a pre-trial identification be unaware of which participant is the suspect, a law enforcement agency complying with the GLECP and CALEA standards could create a guideline that requires all those present at a lineup to be unaware of which participant is the suspect. We were, however, unable to ascertain whether law enforcement agencies, certified by the GLECP, CALEA or otherwise, are complying with this particular ABA Best Practice.

b. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.

The GLECP and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures instruct eyewitnesses that the perpetrator may or may not be in the lineup, that they should not assume the official administering the lineup knows who is the suspect, and that, although they need not identify anyone, any identification must be in their own words. A law enforcement agency complying with the GLECP and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

On this issue, Georgia courts have held that law enforcement officials displaying a lineup to a victim or witness "should avoid telling the person that the lineup contains the . . . suspect."[73] Courts, however, have held that where the witness gained this information from a source independent of the police, the fact that a witness had previous knowledge of the suspect's gender does not make the pre-trial identification procedure impermissibly suggestive.[74] Furthermore, a police statement to a family member of the witness that the suspect is in the lineup does not render a lineup impermissibly suggestive because "the

---

[72] *Id.*; CALEA STANDARDS, *supra* note 47, at 42-3 (Standard 42.2.3).

[73] Clark v. State, 515 S.E.2d 155, 162 (Ga. 1999); *see also* Mitchell v. State, 223 S.E.2d 650, 654 (Ga. 1976).

[74] *Turner*, 575 S.E.2d at 730 (holding that where a newspaper reporter, rather than the police, told the victim that one of the suspected perpetrators was female before identifying the defendant in the pre-trial photo array, the procedure was not impermissibly suggestive).

very fact that a lineup is being conducted suggests that a suspect is contained therein."[75] Additionally, numerous cases in Georgia illustrate witnesses stating either a percentage or general level of certainty in their identification.[76]

Based on Georgia case law, it appears that those conducting lineups in Georgia are cautioned to avoid telling the witness that the lineup contains the suspect, and witnesses generally indicate their level of confidence in their identification. We were, however, unable to ascertain whether Georgia case law or the relevant GLECP and CALEA standards require full compliance with this ABA Best Practice.

2. Foil Selection, Number, and Presentation Methods

a. The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.

b. The guidelines should require that foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.

The GLECP and CALEA standards do not require certified agencies conducting pre-trial identification procedures to adopt written directives specifically requiring the use of a sufficient number of foils that are chosen for their similarity with a witness' description of the perpetrator in order to reduce the risk of eyewitness guessing. A law enforcement agency complying with the GLECP and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this best practice.

Furthermore, Standard Operating Procedure 17-9 of the SLEOM states that a law enforcement official in charge of conducting the lineup should employ a number of actions to reduce the risk of a misidentification based on guessing and avoid drawing undue attention to the suspect in the lineup. The official conducting the lineup or photospread should (1) "[e]nsure that all participants in the lineup are numbered consecutively and are referred to only by number;" (2) "[e]nsure that witnesses are not permitted to see nor are they shown any photographs of the [suspect] immediately prior to the lineup;" (3) "[s]crupulously avoid using statements, clues, casual comments or

---

[75] *Clark*, 515 S.E.2d at 162.

[76] *See* Cockrell v. State, 545 S.E.2d 600, 602 (Ga. Ct. App. 2001) (noting that the witness identified the defendant as one of the perpetrators from a photo lineup, indicating that he was "95 percent positive about his identification"); Markee v. State, 494 S.E.2d 551, 553-54 (Ga. Ct. App. 1997) (noting that when the witness picked the defendant as the perpetrator out of a six-man photospread, she stated she was "100 percent positive" of her identification); Rivers v. State, 484 S.E.2d 519, 522 (Ga. Ct. App. 1997) (noting that, upon viewing a photo array, the witness was "not 100 percent sure but pretty positive" that the defendant was the perpetrator); Thomas v. State, 335 S.E.2d 135, 137 (Ga. Ct. App. 1985) (noting that witness was "90 per cent sure" [sic] of her identification of the defendant as the perpetrator from the photographic lineup).

providing unnecessary or irrelevant information that in any manner may influence the witnesses' decision-making process or perception;" (4) "[w]henever possible, avoid mixing color and black and white photos;" (5) "use photos of the same size and basic composition;" (6) never "include more than one photo of the same suspect"; and (7) "[c]over any portions of mug shots or other photographs that provide identifying information on the subject."[77] Moreover, the primary investigator in the case should include "four to six other persons [to] act as 'fill ins' at the lineup who are the same race, sex and approximate height, weight, age and physical appearance and who are similarly clothed."[78] We were unable, however, to determine to what extent these Standard Operating Procedures have been adopted as required procedure by individual law enforcement agencies.

A review of relevant case law demonstrates that law enforcement officials generally prepare lineups or photo arrays containing six people.[79] However, lineups with less than six people have been considered to be not impermissibly suggestive.[80] Furthermore, case law shows that those preparing pre-trial identification procedures do so with both numerous foils in each lineup[81] and with no foils at all, rendering the suspected perpetrator as the only participant with certain characteristics.[82]

Specifically, Georgia courts have deemed certain pre-trial identification procedures not impermissibly suggestive where the suspect/defendant was the only participant of a certain age,[83] weight,[84] with a certain hair color,[85] and amount of facial hair.[86] Furthermore, the "fact that the defendant's skin tone was the darkest of those portrayed in

---

[77] SLEOM, *supra* note 30, at 17-29.

[78] *Id.* at 17-28 to -29.

[79] *See, e.g.*, Jackson v. State, 531 S.E.2d 747, 751 (Ga. Ct. App. 2000) (noting a six-man photographic lineup); *Markee*, 494 S.E.2d at 553-54 (noting that the witnesses picked defendants as the perpetrators out of a six-man photographic lineup).

[80] *See* Manning v. State, 427 S.E.2d 521, 524 (Ga. Ct. App. 1993) (holding that a photo array of five rather than six people was not impermissibly suggestive).

[81] *See, e.g.*, Williams v. State, 205 S.E.2d 859, 860-61 (Ga. 1974) (holding that the six-person lineup in which all participants were male and of a similar height, size and complexion did not violate defendant's due process); Jackson v. State, 531 S.E.2d 747, 751 (Ga. Ct. App. 2000) (holding that the six-man photo array in which all participants were unmasked, although the perpetrator wore a mask during the crime, was not impermissibly suggestive).

[82] *See, e.g.*, Miller v. State, 512 S.E.2d 272, 274 (Ga. 1999) (noting that the defendant was the only member of the six-person lineup with a full beard, but that one other participant had some facial hair).

[83] Brodes v. State, 551 S.E.2d 757, 759-60 (Ga. Ct. App. 2001) (holding that the six-person photo lineup of all black males, which included two photographs of men appearing much older than the defendant, did not render the photo array impermissibly suggestive).

[84] Green v. State, 467 S.E.2d 203, 206 (Ga. Ct. App. 1996) (holding that the fact that all the men in the six-person photo lineup were not heavy-set like the defendant did not render the procedure impermissibly suggestive).

[85] *See* Talley v. State, 432 S.E.2d 667, 668 (Ga. Ct. App. 1993) (holding that differences in hair color in the photospread did not render the procedure impermissibly suggestive).

[86] *See Miller*, 512 S.E.2d at 274 (holding that an in-person lineup where defendant was the only participant with a full beard was not impermissibly suggestive).

the photo lineup, where the others portrayed were of [the] defendant's same race, was not alone grounds for excluding the lineup" as impermissibly suggestive.[87] Additionally, discrepancies such as the photo of a defendant being slightly larger and having a different background than the other photos in the array, and being partially cut off at the top, "are not so great as to 'lead the viewer inexorably to conclude that the [defendant] was the suspect.'"[88] The simple fact that the defendant was the only participant in both a photo array and an in-person lineup does "not render the pre-trial identification procedures impermissibly suggestive."[89]

Georgia case law also discusses instances where the suspect/defendant's clothing is distinctly different from that of other participants. Such a lineup is not impermissibly suggestive where the witnesses had not described the perpetrator as wearing the clothing that the defendant wore when s/he was identified during the pre-trial identification.[90] However, where the suspect/defendant was wearing the same clothing during the lineup as the witnesses described the perpetrator wearing during the crime, the lineup procedure is impermissibly suggestive because it leads the witness to an "all but inevitable identification" of the defendant as the perpetrator.[91] Police officials can prevent such an infirmity by having the suspect change clothes before appearing in a photo array or physical lineup.[92]

Based on this information, we were unable to ascertain whether Georgia case law or the relevant GLECP and CALEA standards require full compliance with this ABA Best Practice, or whether individual law enforcement agencies have adopted Standard

---

[87] Felder v. State, 579 S.E.2d 28, 33 (Ga. Ct. App. 2003); *Brodes*, 551 S.E.2d at 759-60 (holding that the six-person photo lineup of all black males, including one photograph of a man with much lighter skin than the defendant, did not render the photo array impermissibly suggestive);

[88] *Brodes*, 551 S.E.2d at 760 (citing Karim v. State, 535 S.E.2d 296, 298 (Ga. Ct. App. 2000)).

[89] *Id.* (citing Denegal v. State, 387 S.E.2d 434, 435 (Ga. Ct. App. 1989)); *see also* Rivers v. State, 484 S.E.2d 519, 523 (Ga. Ct. App. 1997).

[90] *See* Heng v. State, 554 S.E.2d 243, 246 (Ga. Ct. App. 2001) (stating the court has "found photo arrays or lineups not impermissibly suggestive when the defendant's clothing differed from the others' in some respect, because in those cases, the witnesses had not described their assailants as wearing the clothing the defendant wore when he was identified"); Jackson v. State, 432 S.E.2d 649, 650 (Ga. Ct. App. 1993) (holding that "[a]lthough the perpetrator was supposed to have worn a red-and-white striped shirt on the day of the robbery, the fact that only the photograph from which [defendant] was identified also depicted someone in a red-and-white striped shirt does not render the pre-indictment photographic array suggestive where, as here, the victim testified that it was not the same pattern of stripes"); *Denegal*, 387 S.E.2d at 435 (holding that although defendant "appeared at the physical line-up wearing a tank top and the other five participants wore t-shirts, the perpetrator was reported to have been wearing a coat and there is no basis for concluding that the clothing worn by appellant at the physical line-up impermissibly suggested that he was the perpetrator"); James v. State, 278 S.E.2d 187, 188 (Ga. Ct. App. 1981) (holding that there is "nothing suggestive in the fact that the [defendant] was wearing military 'fatigue pants' [during the lineup], particularly when [the witness] had no indication that his assailants were in the military service").

[91] *Heng*, 554 S.E.2d at 246 (citing *Miller*, 512 S.E.2d at 274). The *Heng* Court found it was impermissibly suggestive to put the defendant in the lineup wearing an orange, sleeveless jacket described by the witnesses as being worn by the gunman. *Id.*

[92] *See id.* at 246.

Procedure 17-9 of the SLEOM, which meets this ABA Best Practice, as a mandatory internal procedure.

3. Recording Procedures

a. The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.

b. The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.

The GLECP and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures video or digitally record the witness' confidence statement and any law enforcement statements made to witnesses or, in the absence of video recording, that law enforcement officials should photograph the lineup. A law enforcement agency complying with the GLECP and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this best practice.

Furthermore, Standard Operating Procedure 17-9 of the SLEOM states that law enforcement officials should (1) "ensure that a complete written record and videotape recording of the lineup proceedings is made and retained," and (2) "preserve the photo array, together with full information about the identification process, for future reference."[93] We were unable, however, to determine to what extent these Standard Operating Procedures have been adopted as required procedure by individual law enforcement agencies.

The Georgia Court of Appeals has ruled that the trial court could decide on the permissibility of a lineup without admitting into evidence a photograph of the entire lineup as viewed by the victim.[94] Although one Georgia case[95] does not require compliance with this ABA Best Practice, we were unable to ascertain whether Georgia law in general and the relevant GLECP and CALEA standards require full compliance with this ABA Best Practice, or whether individual law enforcement agencies have adopted Standard Procedure 17-9 of the SLEOM, which partially meets this ABA Best Practice, as a mandatory internal procedure.

c. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including

---

[93] SLEOM, *supra* note 30, at 17-28 to -29.

[94] *See* Manning v. State, 427 S.E.2d 521, 524 (Ga. Ct. App. 1993) (holding that the trial court did not err in failing to exclude evidence of the lineup because individual pictures of the participants were entered into evidence for the court to review).

[95] *Id.*

photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.

The GLECP and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures request, in a non-suggestive manner, that the witness indicate his/her level of confidence in any identification and document that statement accurately. A law enforcement agency complying with the GLECP and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this best practice.

A review of Georgia case law indicates at least one instance of a witness signing a form verifying that s/he could not make a positive identification.[96] Additionally, numerous cases demonstrate witnesses indicating a percentage or general level of confidence in their identification.[97]

We were unable to ascertain whether Georgia case law or the relevant GLECP and CALEA standards require full compliance with this ABA Best Practice.

4. Immediate Post-Lineup or Photospread Procedures

a. The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the "right man"—the person believed by law enforcement to be the culprit.

The GLECP and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures avoid giving the witness feedback on whether s/he selected the proper suspect. A law enforcement agency complying with the GLECP and CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

Furthermore, Standard Operating Procedure 17-9 states that a law enforcement official in charge of conducting the lineup should "scrupulously avoid using statements, clues, casual comments or providing unnecessary or irrelevant information that in any manner may influence the witnesses' decision-making process or perception," and in cases of photographic identification, "[n]ever make suggestive statements that may influence the judgment or perception of the witness."[98]

We were, however, unable to ascertain whether Georgia case law or the relevant GLECP and CALEA standards require full compliance with this ABA Best Practice, or whether individual law enforcement agencies have adopted Standard Procedure 17-9 of the

---

[96] *See* Lemons v. State, 608 S.E.2d 15, 17 (Ga. Ct. App. 2004).
[97] *See supra* note 76 and accompanying text.
[98] SLEOM, *supra* note 30, at 17-28 to -29.

SLEOM, which partially meets this ABA Best Practice, as a mandatory internal procedure.

In conclusion, even though numerous law enforcement agencies should have adopted written directives to be in compliance with the GLECP and/or CALEA, the GLECP and CALEA standards do not require agencies to adopt written directives as specific as the ABA Best Practices require in Recommendation #1. Moreover, we were unable to obtain the written directives adopted by all law enforcement agencies to assess whether they comply with Recommendation #1. Furthermore, to the extent that the relevant Standard Operating Procedures of the SLEOM meet this ABA Best Practice, we were unable to determine whether individual law enforcement agencies have adopted the SLEOM as their own internal mandatory procedures. We are, therefore, unable to conclude with certainty whether the State of Georgia meets the requirements of Recommendation #1.

B. Recommendation #2

Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.

The POST Council's basic training course curriculum clearly provides for instruction on avoiding non-suggestive methods of interviewing witnesses such as leading or specific questions, and threatening negative consequences for witnesses who fail to fully cooperate with law enforcement questioning.[99] However, the basic training course does not appear to include any instruction on conducting pre-trial identification procedures.

The GLECP and CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures receive periodic training on how to implement guidelines for such procedures, including training on non-suggestive techniques for interviewing witnesses. A law enforcement agency complying with the GLECP and/or CALEA standards, requiring the agency to establish "a written directive that requires each sworn officer [to] receive annual training on legal updates"[100] and "any other training as prescribed by law,"[101] could create a training program that complies with Recommendation #2. We were, however, unable to sufficiently ascertain whether law enforcement agencies, certified by the GLECP, CALEA or otherwise, are complying with this particular Recommendation.

Similar to the training offered to law enforcement officers, the Prosecuting Attorneys' Council of Georgia offered a training program for prosecutors in Georgia that included

---

[99] *See* POST COUNCIL BASIC TRAINING COURSE, *supra* note 15, at 4.5-5 to -8.

[100] GLECP STANDARDS, *supra* note 49, at 4 (Standard 1.11); *see also* CALEA STANDARDS, *supra* note 47, at 33-4 (Standard 33.5.1).

[101] GLECP STANDARDS, *supra* note 49, at 4 (Standard 1.11)

instruction on interviewing witnesses and police officers.[102] However, it appears that this course is not regularly offered and is voluntary. Moreover, we were unable to ascertain to what extent the course provides training on how to implement guidelines for conducting pre-trial identification procedures and non-suggestive methods for interviewing witnesses.

Because we can only conclude with certainty that law enforcement officials are required to receive basic training on non-suggestive interviewing techniques, the State of Georgia only partially meets the requirements of Recommendation #2.

C. Recommendation #3

> **Law enforcement agencies and prosecutors offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.**

We were unable to obtain sufficient information to assess whether law enforcement agencies and prosecutors in Georgia periodically update their guidelines for conducting pre-trial identifications. Therefore, we were unable to conclude with certainty whether the State of Georgia meets the requirements of Recommendation #3.

D. Recommendation #4

> **Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.**

As of September 14, 2005, seven police departments in Georgia—the Atlanta Police Department, the Cobb County Police Department, the DeKalb County Police Department, the Fulton County Police Department, the Gwinnett County Police Department, the Macon Police Department, and the Savannah-Chatham Police Department—regularly record the entirety of custodial interrogations.[103] These police departments use either audio or video recording equipment to record interviews of persons under arrest in a police facility from the moment *Miranda*[104] warnings are given

---

[102] *See* Prosecuting Attorneys' Council of Georgia, PAC Training, *at* http://www.pacga.org/training/pac.shtml (last visited on Nov. 4, 2005); Prosecuting Attorneys' Council of Georgia, Fundamentals of Prosecution Training Course, *at* http://www.pacga.org/downloads/training/2005_fundament_pros/announce_&_registr.pdf (last visited on Nov. 17, 2005).

[103] Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 CENTER ON WRONGFUL CONVICTIONS SPEC. REP., at A5 (2004).

[104] Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination).

until the interview ends.[105] Moreover, a review of Georgia case law indicates that police departments in two other counties have videotaped custodial interrogations.[106]

The POST Council's basic training course, a requirement for all law enforcement officials in Georgia, requires law enforcement officials to make at least a written recording of the entirety of an interrogation. The training curriculum only suggests the "video or audio-taping [of] the entire interview in addition to or in place of professional stenographic services."[107] The training course does not require or even express a preference for video or audio recording of the entirety of the interview or interrogation.

Furthermore, Standard Operating Procedure 8-3 of the MLEOM and SLEOM states that "[w]henever possible, any statement made by the accused should be recorded on either audio or video tape . . . includ[ing] the accused's waiver of rights at both the beginning and end of the tape."[108] We were unable, however, to determine to what extent this Standard Operating Procedure has been adopted as required procedure by individual law enforcement agencies.

Although some law enforcement agencies in Georgia videotape or audiotape the entirety of custodial interrogations, not all appear to be doing so. Additionally, although Standard Operating Procedure 8-3 of the MLEOM and SLEOM could be construed as meeting this ABA Best Practice, we are unable to determine whether individual law enforcement agencies have adopted the MLEOM and/or SLEOM as internal mandatory procedures. Therefore, the State of Georgia only partially meets the requirements of Recommendation #4.

E. Recommendation #5

Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.

We are unable to ascertain whether the State of Georgia provides adequate funding to ensure the proper development, implementation and updating of procedures for identifications and interrogations. Therefore, we cannot determine whether the State of Georgia meets the requirements of Recommendation #5.

---

[105] *See* Sullivan, *supra* note 103, at 5, A5. This report, however, does not include departments that conduct unrecorded interviews followed by recorded confessions or recordings made outside a police station or lockup, such as at crime scenes or in squad cars. *Id.* at 5.

[106] *See* Smith v. State, 491 S.E.2d 519, 521 (Ga. Ct. App. 1997) (Clarke County); Sweatman v. State, 352 S.E.2d 796, 797 (Ga. Ct. App. 1987) (Forsyth County).

[107] POST COUNCIL BASIC TRAINING COURSE, *supra* note 15, at 4.5-18.

[108] MLEOM, *supra* note 32, at 8-16 (Standard Operating Procedure 8-3); SLEOM, *supra* note 30, at 8-16 (Standard Operating Procedure 8-3). "Any statement made by the accused" could include the entirety of the custodial interrogation. MLEOM, *supra* note 32, at 8-16 (Standard Operating Procedure 8-3); SLEOM, *supra* note 30, at 8-16 (Standard Operating Procedure 8-3).

F. Recommendation #6

Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.

In light of a new trend among an overwhelming majority of both federal and state courts, the Georgia Supreme Court has recently held that the "admission of expert testimony regarding eyewitness identification is in the discretion of the trial court."[109] Specifically, "where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification."[110] However, "the admission or exclusion of this evidence 'lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a clear abuse of discretion.'"[111] The State of Georgia, therefore, meets the requirements of Recommendation #6.

G. Recommendation #7

Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.

The Georgia Suggested Pattern Jury Instructions in Criminal Cases includes an instruction that provides juries with factors to consider when determining the reliability of eyewitness identification.[112] The text of the instruction is as follows:

> Identity is a question of fact for determination by the jury. It is dependent upon the credibility of the witness or witnesses offered for this purpose, and you have the right to consider all of the factors previously charged you regarding credibility of witnesses.

---

[109] Johnson v. State, 526 S.E.2d 549, 552 (Ga. 2000). Georgia case law previously provided that "[t]he determination of a witness' credibility, including the accuracy of eyewitness identification, [was] within the exclusive province of the jury." Norris v. State, 376 S.E.2d 653, 654 (Ga. 1989). Thus, Georgia law, previous to *Johnson*, stated that expert testimony regarding the credibility and accuracy of eyewitness identification is generally inadmissible, except when it concerns organic or mental disorders or some impairment of the mental or physical faculties of the eyewitness. *See* Jones v. State, 208 S.E.2d 850, 853 (Ga. 1974). Expert testimony regarding eyewitness credibility would, therefore, generally have been excluded because the subject matter is normally within the scope of the ordinary layman's knowledge, which left cross examination as the primary medium to attack the eyewitness's credibility. *Id.*; *cf.* Loomis v. State, 51 S.E.2d 33 (Ga. 1948); Goodwyn v. Goodwyn, 20 Ga. 600 (Ga. 1856).

[110] *Johnson*, 526 S.E.2d at 552-53.

[111] *Id.* at 553.

[112] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 206.00(1) (3d ed. 2003).

> Some, but not all, of the factors you may consider, in assessing reliability of identification, are:
>
> a. The opportunity of the witness to view the alleged perpetrator at the time of the alleged incident;
> b. The witness's degree of attention toward the alleged perpetrator at the time of the alleged incident;
> c. The level of certainty shown by the witness about his/her identification;
> d. The possibility of mistaken identity;
> e. Whether the witness's identification may have been influenced by factors other than the view that the witness claimed to have; [and]
> f. Whether the witness, on any prior occasion, did not identify the defendant in this case as the alleged perpetrator.[113]

Since the most recent publication of the Georgia Suggested Pattern Jury Instructions in Criminal Cases, the Georgia Supreme Court has held that trial courts should not instruct the jury that they should consider "[t]he level of certainty shown by the witness about his/her identification" as a factor in determining the reliability of an eyewitness identification.[114] The Court reasoned that "the idea that a witness's certainty in his or her identification of a person as a perpetrator reflected the witness's accuracy has been 'flatly contradicted by well-respected and essentially unchallenged empirical studies,'" and thus should not be given with the pattern jury instruction.[115]

The Georgia Supreme Court has found that this pattern jury instruction, excluding the factor pertaining to the level of certainty shown by the witness, "should be given when testimony warrants,"[116] such as when there has been an identification prior to trial and the identity of the perpetrator is a central issue in the jury trial.[117]

The State of Georgia, therefore, meets the requirements of Recommendation #7, because it provides a pattern jury instruction that should be given to the jury to instruct on the factors to consider when determining the reliability and accuracy of an eyewitness identification.

---

[113] *Id.*

[114] *See* Brodes v. State, 614 S.E.2d 766, 767 n.1, 771 (Ga. 2005). However, the Georgia Court of Appeals has found that the error in giving the "level of certainty" factor was harmless where the defendant was also identified by eyewitnesses who met him before the commission of the crime. *See* Dunson v. State, 2005 WL 2248277, *2 (Ga. Ct. App. Sept. 16, 2005) (holding that given the "level of certainty" factor was harmless because, unlike *Brodes* where the eyewitnesses who made the positive identifications were strangers to the defendant, the eyewitnesses in the instant case had met him and conversed with him before the robbery). The Georgia Court of Appeals has also found that a defendant is estopped from challenging the giving of the "level of certainty" factor if the defendant requested that the factor be given within the instruction. Morton v. State, 2005 WL 3072720, *2 (Ga. Ct. App. Nov. 17, 2005).

[115] *Brodes*, 614 S.E.2d at 770-71 (citing State v. Long, 721 P.2d 483, 491 (Utah 1986)).

[116] *Id.* at 769 n.6.

[117] *Id.* (citing to Robinson v. State, 754 A.2d 1153 (N.J. 2000)).

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that crime laboratories and medical examiner offices, as well as forensic and medical examiners, provide expert, accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by unaccredited and accredited crime laboratories have increasingly been called into serious question.[1] While the majority of crime laboratories and medical examiner offices, along with the people who work in them, strive to do their work accurately and impartially, a troubling number of laboratory technicians have been accused and/or convicted of failing properly to analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of many innocent individuals.

The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to lack of proper training and supervision, the lack of testing procedures or the failure to follow procedures, and inadequate funding.

In order to take full advantage of the power of forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, crime labs and medical examiner offices must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

---

[1] *See* Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000); Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 CHAMPION 6 (2004); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 CHAMPION 16 (2004).

I. FACTUAL DISCUSSION

In 1997, the Georgia Legislature adopted the "Georgia Forensic Science Act of 1997" (the Act) to consolidate and revise Georgia's laws pertaining to the testing of evidence by the Division of Forensic Sciences of the Georgia Bureau of Investigation (the Division) and to establish an Office of Chief Medical Examiner within the Division.[2] Under the Act, the Division's responsibilities include but are not limited to providing a statewide system of crime laboratories[3] and establishing "written standards and procedures for the administration of forensic testing,"[4] which may include "standards for the identification, collection, transportation, and analysis of forensic evidence."[5] All "procedures, guidelines, standards, and methods for the collection, preservation, or testing of evidence adopted by the Division" are exempt from the "Georgia Administrative Procedure Act," which means that the standards do not have to be "published or made available for public inspection" in order to become effective.[6]

A. Crime Laboratories

1. The Division's Statewide System of Crime Laboratories

The Division's statewide system of crime laboratories is "dedicated to conducting forensic analysis of evidence submitted to the laboratory by law enforcement agencies, prosecuting attorneys, coroners, and medical examiners."[7] The Division also facilitates "independent testing or analysis of evidence within the possession, custody, or control of the Division" for purposes of discovery in criminal cases.[8]

The Division's statewide system of crime laboratories includes a headquarters laboratory in Decatur, Georgia (Headquarters Laboratory)[9] and seven regional laboratories in the following locations:

1. Augusta (Eastern Regional Crime Laboratory);
2. Cleveland (Northeast Regional Crime Laboratory);
3. Midland (Columbus) (Western Regional Crime Laboratory);
4. Dry Branch (Macon) (Central Regional Crime Laboratory);

---

[2] 1997 Ga. Laws 439.
[3] O.C.G.A. § 35-3-151(1) (2004).
[4] O.C.G.A. § 35-3-154(1) (2004).
[5] O.C.G.A. § 35-3-151(3) (2004).
[6] O.C.G.A. § 35-3-155 (2004); *see also* O.C.G.A. § 50-13-03(b) (2004).
[7] O.C.G.A. § 35-3-151(1) (2004).
[8] O.C.G.A. § 35-3-151(4) (2004).
[9] The Headquarters Laboratory is divided into eleven sections: (1) Administrative; (2) Trace Evidence; (3) Firearms; (4) Chemistry; (5) Implied Consent (Alcohol Testing); (6) Latent Print; (7) Pathology; (8) Questioned Documents; (9) Forensic Biology (DNA); (10) Toxicology; and (11) Photography. *See* Georgia Bureau of Investigation, Division of Forensic Services, *at* www.ganet.org/gbi/fordiv.html (last visited on Oct. 5, 2005).

5. Moultrie (Southwestern Regional Crime Laboratory);
6. Savannah (Coastal Regional Crime Laboratory); and
7. Trion (Summerville) (Northwestern Regional Crime Laboratory).[10]

The Headquarters Laboratory is divided into eleven specialized sections,[11] which together provide a wide range of laboratory services, including: Alcohol Proof, Automated Fingerprint Identification System (AFIS), Autopsy, Blood Alcohol, Blood Identification, CODIS, DNA Profiling, Drugs, Filament, Firearms, Fire Debris, Fibers, Footwear and Tire Impressions, Fractured Materials, Glass, Hairs, IBIS, Inks, Intoxilyzer Training, Latent Prints, Machine Impressions, Paints and Coatings, Paper, Plastics/Polymers, Photography, Questioned Documents, Saliva Identification, Semen Identification, Toolmarks, and Toxicology.[12]

The laboratory services provided at the seven regional laboratories are not as expansive as those provided at the Headquarters Laboratory and vary from laboratory to laboratory. Each of the seven regional laboratories provide the following services:

1. Eastern Regional Crime Laboratory - Alcohol Proof, Blood Alcohol, Drugs, and Toxicology;
2. Northeast Regional Crime Laboratory - Drugs;
3. Western Regional Crime Laboratory - Drugs, Fire Debris, Footwear and Tire Impressions, Firearms, and Toolmarks;
4. Central Regional Crime Laboratory - Alcohol Proof, Blood Alcohol, Drugs, Toxicology, and Firearms;
5. Southwestern Regional Crime Laboratory - Alcohol Proof, Blood Alcohol, Drugs, and Toxicology;
6. Coastal Regional Crime Laboratory -Alcohol Proof, Blood Alcohol, DNA Analysis, Drugs, Fire Debris, and Toxicology;
7. Northwestern Regional Crime Laboratory - Alcohol Proof, Blood Alcohol, Drugs, Firearms, Toolmarks, and Toxicology.[13]

All reports of the methods and findings of any examination or analysis conducted by an employee of any of the Division's laboratories, which are authenticated under oath, are *prima facie* evidence in court proceedings of the facts contained therein.[14] Attached to the report must be an affidavit of the employee stating: (1) that he or she is certified to perform the requisite analysis or examination; (2) his or her experience as a chemist or

---

[10] *See id.*; Georgia Bureau of Investigation, Division of Forensic Services, Laboratory Services and Requirements for Submitting Evidence, *at* http://www.ganet.org/gbi/labmanual.html (last visited on Oct. 5, 2005).

[11] Georgia Bureau of Investigation, Division of Forensic Sciences, *at* http://www.ganet.org/gbi/fordiv.html (last visited on Oct. 5, 2005).

[12] Georgia Bureau of Investigation, Division of Forensic Services, Laboratory Services and Requirements for Submitting Evidence, *at* http://www.ganet.org/gbi/labmanual.html (last visited on Oct. 5, 2005).

[13] *See id.*

[14] O.C.G.A. § 35-3-154.1(a) (2004).

analyst and as an expert witness testifying in court; and (3) that he or she conducted the tests shown on the report using procedures approved by the Georgia Bureau of Investigation and the report accurately reflects his or her opinions of the results.[15] Because the procedures for the collection, preservation, or testing of evidence adopted by the Division do not have to be "published or made available for public inspection," it is instructive to review the requirements of the accreditation programs through which some of the Division laboratories have obtained accreditation to understand the procedures, guidelines, standards, and methods used by the Division laboratories.[16]

2. Crime Laboratory Accreditation

The Division's Crime Lab Annual Report 2004 states that the Division "has been accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) since 1999 and the ISO 17025 General Requirements for the Competency of Testing and Calibration Laboratories since 2001."[17]

a. ASCLD/LAB Accreditation

"The Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) is a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and personnel safety procedures meet established standards."[18] According to the ASCLD/LAB website, seven of the eight Division laboratories are currently accredited through the ASCLD/LAB program, including: (1) Headquarters Crime Laboratory, (2) Central Regional Crime Laboratory, (3) Coastal Regional Crime Laboratory, (4) Eastern Regional Crime Laboratory, (5) Northwestern Regional Crime Laboratory, (6) Southwestern Regional Crime Laboratory, and (7) Western Regional Crime Laboratory.[19]

---

[15] O.C.G.A. § 35-3-154.1(b) (2004).

[16] *See, e.g.*, AM. SOC'Y OF CRIME LAB. DIRS., LAB. ACCREDITATION BD., LABORATORY ACCREDITATION BOARD 2003 MANUAL 3, app. 1 [hereinafter ASCLD/LAB 2003 MANUAL] (on file with author); NATIONAL FORENSIC SCIENCE TECHNOLOGY CENTER, FORENSIC QUALITY SERVICES-INTERNATIONAL DIVISION, ISO/IEC 17025: GENERAL REQUIREMENTS FOR THE COMPETENCE OF TESTING AND CALIBRATION LABORATORIES 1 (1999) [hereinafter FQS-I, ISO/IEC 17025 GENERAL REQUIREMENTS] (on file with author). It should be noted that laboratories receiving federal funding must also comply with the Federal Bureau of Investigation's DNA Quality Assurance Standards, requiring periodic external audits to ensure compliance with the required quality assurance standards. *See* 42 U.S.C. § 14131(a)(1) (2005); DNA Advisory Board, *Quality Assurance Standards for Forensic DNA Testing Laboratories*, 2 FORENSICS SCI. COMM. 3 (July 2000). We did not obtain sufficient information to state whether any Division laboratories are currently receiving federal funding.

[17] *See* GA. BUREAU OF INVESTIGATION, DIVISION OF FORENSIC SERVICES, CRIME LAB ANNUAL REPORT 2004, *at* http://www.ganet.org/gbi/04annual/DOFS_FY04.pdf (last visited on Oct. 5, 2005).

[18] American Society of Crime Laboratory Directors, Accreditation, *at* http://www.ascld.org/accreditation.html (last visited on Oct. 5, 2005).

[19] American Society of Crime Laboratory Directors, Laboratories Accredited by ASCLS/LAB, *at* http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#GA (last visited on Oct. 5, 2005).

i. Application Process for ASCLD/LAB Accreditation

To obtain accreditation by the ASCLD/LAB, the laboratory must submit an "Application for Accreditation," documenting the qualifications of staff, laboratory quality manual(s), procedures for handling and preserving evidence, procedures on case records, and security procedures.[20] In addition to the application, the laboratory must submit a "Grade Computation/Summation of Criteria Ratings," which is based on the laboratory's self-evaluation of whether it is in compliance with all of the criteria contained in the ASCLD/LAB Laboratory Accreditation Board Manual.[21]

ii. ASCLD/LAB Accreditation Standards and Criteria

The ASCLD/LAB Laboratory Accreditation Board 2003 Manual (the Manual) contains various standards and criteria, each of which has been assigned a rating of Essential, Important, or Desirable.[22] In order to obtain accreditation through ASCLD/LAB, "[the] laboratory must achieve not less than 100% of the Essential,[23] 75% of the Important,[24] and 50% of the Desirable[25] criteria."[26] Some of the Essential criteria contained in the Manual require as follows:

1. clearly written and well understood procedures for handling and preserving the integrity of evidence, laboratory security, preparation, storage, security and disposition of case records and reports, and for maintenance and calibration of equipment and instruments;[27]
2. a training program to develop the technical skills of employees in each applicable functional area;[28]
3. a chain of custody record that provides a comprehensive, documented history of evidence transfer over which the laboratory has control;[29]
4. the proper storage of evidence to protect the integrity of the evidence;[30]
5. a comprehensive quality manual;[31]

---

[20] ASCLD/LAB 2003 MANUAL, *supra* note 16, at 3, app. 1.
[21] *Id.* at 3.
[22] *Id.* at 2.
[23] The Manual defines "Essential" as "[s]tandards which directly affect and have fundamental impact on the work product of the laboratory or the integrity of the evidence." *Id.*
[24] The Manual defines "Important" as "[s]tandards which are considered to be key indicators of the overall quality of the laboratory but may not directly affect the work product nor the integrity of the evidence." *Id.*
[25] The Manual defines "Desirable" as "[s]tandards which have the least effect on the work product or the integrity of the evidence but which nevertheless enhance the professionalism of the laboratory." *Id.*
[26] *Id.* (emphasis omitted).
[27] *Id.* at 14.
[28] *Id.* at 19.
[29] *Id.* at 20.
[30] *Id.* at 21.
[31] *Id.* at 23.

6. the performance of an annual review of the laboratory's quality system;[32]
7. the use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;[33]
8. the performance and documentation of administrative reviews of all reports issued;[34]
9. the monitoring of the testimony of each examiner at least annually;[35] and
10. a documented program of proficiency testing, measuring examiners' capabilities and the reliability of analytical results.[36]

The Manual also contains Essential criteria on personnel qualifications, requiring each examiner to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments and methods and procedures.[37] Additionally, the examiners must successfully complete a competency test prior to assuming casework and successfully complete annual proficiency tests.[38]

Once the laboratory has assessed whether it is in compliance with the ASCLD/LAB criteria and submitted a complete application, the ASCLD/LAB inspection team, headed by a team captain, will arrange an on-site inspection of the laboratory.[39]

iii. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of interviewing analysts and reviewing a sample of case files, including all notes and data, generated by each analyst.[40] The inspection team will also interview all trainees to evaluate the laboratory's training program.[41] At the conclusion of the inspection, the inspection team will meet with the laboratory director to review the findings and discuss any deficiencies.[42]

The inspection team must provide a draft inspection report to the Executive Director of the ASCLD/LAB, who will then distribute the report to the "audit committee" consisting of a member of the ASCLD/LAB Board, the Executive Director, at least three staff inspectors, and the inspection team captain.[43] Decisions on accreditation must be made

---

[32] *Id.* at 27.
[33] *Id.* at 27.
[34] *Id.* at 31.
[35] *Id.* at 32.
[36] *Id.* at 33-34.
[37] *Id.* at 38-45.
[38] *Id.*
[39] *Id.* at 5.
[40] *Id.*
[41] *Id.* at 6.
[42] *Id.*
[43] *Id.*

within twelve months of "the date of the laboratory's first notification of an audit committee's consideration of the draft inspection report."[44] During that time period, the laboratory may correct any deficiencies identified by the inspection team during the on-site inspection.[45]

If the ASCLD/LAB Board grants accreditation to the laboratory, it will be effective for five years "provided that the laboratory continues to meet ASCLD/LAB standards, including completion of the Annual Accreditation Audit Report and participation in prescribed proficiency testing programs."[46] After the five-year time period, the laboratory must apply for reaccreditation and undergo another on-site inspection.[47]

In addition to ASCLD/LAB accreditation, it appears that some Division laboratories have also obtained ISO/IEC 17025 accreditation.

b. ISO/IEC 17025 Accreditation

ISO/IEC 17025 "specifies the general requirements for the competence to carry out tests and/or calibrations, including sampling. It covers testing and calibration performed using standard methods, non-standard methods, and laboratory-developed methods."[48] Seven of the eight Division laboratories currently possess ISO/IEC 17025 accreditation through the Forensic Quality Services-International Division of the National Forensic Science Technology Center (FQS-I).[49] The seven laboratories include: (1) Headquarters Crime Laboratory, (2) Eastern Regional Crime Laboratory, (3) Western Regional Crime Laboratory, (4) Central Regional Crime Laboratory, (5) Southwestern Regional Crime Laboratory, (6) Coastal Regional Crime Laboratory, and (7) Northwestern Regional Crime Laboratory, but the scope of the ISO/IEC 17025 accreditation granted by FQS-I to each laboratory varies from laboratory to laboratory.[50]

---

[44] *Id.* at 7.
[45] *Id.*
[46] *Id.* at 1.
[47] *Id.*
[48] FSQ-I, ISO/IEC 17025 GENERAL REQUIREMENTS, *supra* note 16, at 1.
[49] National Forensic Science Technology Center, Forensic Quality Services-International Division, ISO/IEC Accredited Laboratories, *at* http://www.forquality.org/accreditation.htm#atlanta (last visited on Oct. 5, 2005).
[50] *Id.* For a description of the scope of the accreditation granted to each Division laboratory, see Georgia Bureau of Investigation, ISO/IEC 17025 Scope of Accreditation, *at* http://www.forquality.org/Accred%20Docs/GBI/GBI_HQ/GBI%20HQ%20SCOPE%20wjt-4.pdf (Headquarters Laboratory) (last visited on Oct. 5, 2005); Georgia Bureau of Investigation, ISO/IEC 17025 Scope of Accreditation, *at* http://www.forquality.org/Accred%20Docs/GBI/GBI_Eastern/GBI%20Eastern%20_Augusta_%20SCOPE%20wjt-4.pdf (Eastern Regional Laboratory) (last visited on Oct. 5, 2005); Georgia Bureau of Investigation, ISO/IEC 17025 Scope of Accreditation, *at* http://www.forquality.org/Accred%20Docs/GBI/GBI_Western/Western-Columbus.pdf (Western Regional Laboratory) (last visited on Oct. 5, 2005); Georgia Bureau of Investigation, ISO/IEC 17025 Scope of Accreditation, *at* http://www.forquality.org/Accred%20Docs/GBI/GBI_Central/GBI%20Central%20_Macon_%20SCOPE%

i. Applying for ISO/IEC 17025 Accreditation through FQS-I

Before applying for accreditation, the laboratory must first "participate in one proficiency test or interlaboratory comparison"[51] and ensure that it meets the "General Requirements for Accreditation"[52] and any applicable "Field Specific Standards."[53] To apply for accreditation, the laboratory must submit an "Application for Accreditation by FQS-I,"[54] certifying that it will comply with the requirements for accreditation and provide any information needed for the evaluation, including but not limited to: (1) definition of the materials and products tested, methods used and tests performed; (2) a copy of the laboratory's quality manual; and (3) the primary function of the laboratory.[55]

Once the application has been submitted, FQS-I will appoint assessors to evaluate all of the materials collected from the laboratory and to conduct an assessment of the laboratory.[56] In order for the laboratory to be approved for accreditation, the laboratory must satisfy all of the Management and Technical Requirements of ISO/IEC 17025, as

---

20wjt-4.pdf (Central Regional Laboratory) (last visited on Oct. 5, 2005); Georgia Bureau of Investigation, ISO/IEC 17025 Scope of Accreditation, *at* http://www.forquality.org/Accred%20Docs/GBI/GBI_Southwest/GBI%20Southwestern%20_Moultrie_%20SCOPE%20wjt-4.pdf (Southwestern Regional Laboratory) (last visited on Oct. 5, 2005); Georgia Bureau of Investigation, ISO/IEC 17025 Scope of Accreditation, *at* http://www.forquality.org/Accred%20Docs/GBI/GBI_Coastal/GBI%20Coastal%20_Savannah_%20SCOPE%20wjt-4.pdf (Coastal Regional Laboratory) (last visited on Oct. 5, 2005); Georgia Bureau of Investigation, ISO/IEC 17025 Scope of Accreditation, *at* http://www.forquality.org/Accred%20Docs/GBI/GBI_Northwest/GBI%20Northwestern%20_Summerville_%20SCOPE%20wjt-4.pdf (Northwestern Regional Laboratory) (last visited on Oct. 5, 2005).

[51] NATIONAL FORENSIC SCIENCE TECHNOLOGY CENTER, FORENSIC QUALITY SERVICES-INTERNATIONAL DIVISION, GENERAL REQUIREMENTS FOR ACCREDITATION 5 [hereinafter FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS], *at* http://www.forquality.org/FQS-I%20Acc%20Docs/GRA-FQS-I-05-04.pdf (last visited on Oct. 5, 2005). The laboratory must provide FQS-I with the following information regarding the proficiency testing program: (1) details of the program, (2) procedures for establishment of assigned values, (3) instructions to participants, (4) statistical treatment of data, (5) final report from selected proficiency tests, and (6) what is considered satisfactory performance in the program. *Id.*

[52] *Id.* at 3.

[53] The General Requirements for Accreditation provides that some "individual laboratory accreditation programs may also have Field Specific Criteria that provide interpretation of Parts 4 and or 5, and include additional requirements." *See id.* at 9. It appears that the Field Specific Criteria adopted by FQS-I refer to laboratories conducting forensic testing in general (FRA-1) and those that conduct forensic testing of DNA evidence. *See* FQS-I ISO ACCREDITATION SERVS., FRA-1, *at* http://www.forquality.org/FQS-I%20Acc%20Docs/FQSI-FRA-1.pdf (last visited on Oct. 5, 2005); FQS-I ISO ACCREDITATION SERVS., FRA-2, *at* http://www.forquality.org/FQS-I%20Acc%20Docs/FRA2_0305.pdf (last visited on Oct. 5, 2005).

[54] FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS, *supra* note 49, at 3; *see also* FQS-I ISO ACCREDITATION SERVS., APPLICATION FOR ACCREDITATION BY FQS-I, *at* http://www.forquality.org/FQS-I%20Acc%20Docs/FQS-I%20Applicatiojn%205-04.pdf (last visited on Oct. 5, 2005).

[55] FQS-I ISO ACCREDITATION SERVS., APPLICATION FOR ACCREDITATION BY FQS-I, *at* http://www.forquality.org/FQS-I%20Acc%20Docs/FQS-I%20Applicatiojn%205-04.pdf (last visited on Oct. 5, 2005).

[56] FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS, *supra* note 51, at 3.

published in the "General Requirements for Accreditation," any applicable "Field Specific Standards,"[57] and the applicable requirements of the Forensic Requirements for Accreditation Guidelines.[58]

ii. Management and Technical Requirements of ISO/IEC 17025

The Management and Technical Requirements of ISO/IEC 17025 are similar to the requirements of the ASCLD/LAB accreditation program. For example, ISO/IEC 17025 requires the laboratory to have a quality manual,[59] a training program that is relevant to present and anticipated tasks,[60] and laboratory personnel who are "qualified on the basis of appropriate education, training, experience, and/or demonstrated skills."[61] But ISO/IEC 17025 also includes extensive criteria governing appropriate testing and calibration methods.[62]

iii. Decisions on ISO/IEC 17025 Accreditation and the Duration of Accreditation

If the laboratory meets the Management and Technical Requirements of ISO/IEC 17025, as published in the "General Requirements for Accreditation," all applicable "Field Specific Standards," and the applicable requirements of the Forensic Requirements for Accreditation Guidelines and is approved for accreditation, then the laboratory will be granted a certificate of accreditation for a two-year period,[63] which will be accompanied by a "Scope Document," detailing the tests, or types of tests, for which accreditation has been granted.[64]

To maintain accreditation, the laboratory must continue to comply with the "standards as described in its certificate of accreditation and demonstrated by an agreed system of monitoring" (e.g. review of proficiency test results and internal audit reports).[65] After two years, the laboratory must apply for reaccredidation.[66]

---

[57] *See supra* note 53 and the accompanying text.

[58] FSQ-I Programs, ISO/IEC 17025 Accreditation Services, *at* http://www.forquality.org/accreditation.htm (last visited on Oct. 5, 2005); FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS, *supra* note 51, at 4. It appears that the Forensic Requirements for Accreditation Guidelines can be found at FSQ-I Programs, ISO/IEC 17025 Accreditation Services, *at* http://www.forquality.org/accreditation.htm#atlanta (last visited on Oct. 5, 2005) (FRAPs 1 through 6).

[59] FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS, *supra* note 51, at 11.

[60] *Id.* at 24.

[61] *Id.*

[62] *Id.* at 26-31.

[63] *Id.* at 3.

[64] *See, e.g.*, Georgia Bureau of Investigation, ISO/IEC 17025 Scope of Accreditation, *at* http://www.forquality.org/Accred%20Docs/GBI/GBI_HQ/GBI%20HQ%20SCOPE%20wjt-4.pdf (Headquarters Laboratory) (last visited on Oct. 5, 2005).

[65] FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS, *supra* note 51, at 2.

[66] *Id.* at 5.

B. *Medical Examiner Offices*

1. The Office of the Chief Medical Examiner and the Regional Medical Examiner Offices

The State of Georgia's Office of Chief Medical Examiner is housed within the Division of Forensic Sciences of the Georgia Bureau of Investigation at the "Headquarters Medical Examiner Facility" in Decatur, Georgia.[67] The Chief Medical Examiner is appointed by the Director of the Georgia Bureau of Investigation (GBI) and employed by the GBI.[68] To be eligible for the position of Chief Medical Examiner, the individual must be a pathologist certified in forensic pathology by the American Board of Pathology.[69]

The Chief Medical Examiner's responsibilities include, but are not limited to:

1. establishing and overseeing death investigation regions;
2. establishing policies concerning requirements for appointment of regional medical examiners;
3. appointing regional medical examiners;
4. employing forensic consultants and independent contractors;
5. organizing and conducting regular educational sessions as may be needed for medical examiners and coroners in the state in cooperation with the Georgia Coroner's Training Council and the Georgia Police Academy;
6. maintaining permanent death investigation records; and
7. establishing death investigation guidelines for coroners and medical examiners.[70]

To be appointed by the Chief Medical Examiner as a regional medical examiner, the individual must be a pathologist.[71] All regional medical examiners are employed by the GBI and work at one of the five Regional Medical Examiner Offices.[72]

2. Coroner's Offices and County Medical Examiner Offices

In addition to the Office of the Chief Medical Examiner and the Regional Medical Examiner Offices, a coroner's office exists in each county except in counties in which the coroner's office has been abolished and replaced with a county medical examiner

---

[67] O.C.G.A. § 35-3-153(a) (2004); National Association of Medical Examiners, Associate Medical Examiner Positions Job Announcement (on file with author).

[68] O.C.G.A. § 35-3-153(b) (2004); O.C.G.A. § 45-16-21(13) (2004).

[69] O.C.G.A. § 35-3-153(b) (2004). For a list of the American Board of Pathology requirements for certification and re-certification, see American Board of Pathology, Requirements for Primary and Subspecialty Certifications, *at* http://www.abpath.org/ReqForCert.htm (last visited on Oct. 5, 2005).

[70] O.C.G.A. § 35-3-153(c) (2004).

[71] O.C.G.A. § 45-16-21(13) (2004).

[72] National Association of Medical Examiners, Associate Medical Examiner Positions Job Announcement (on file with author); O.C.G.A. § 45-16-21(13) (2004).

office.[73] The qualification requirements for the two positions vary, but the powers and responsibilities associated with each position are similar.

a. Qualification Requirements for Coroners and County Medical Examiners

All coroners are elected officials who hold office for four years.[74] To be eligible for the office of the county coroner, the individual must meet the following qualifications:

1. Be a citizen of the United States;
2. Be a resident of the county in which s/he seeks the office of coroner for at least two years prior to his/her qualifying for the election to the office and remain a resident of such county during his/her term of office;
3. Be a registered voter;
4. Have attained the age of 25 years prior to the date of the general primary in the year s/he qualifies for the election to the office;
5. Have obtained a high school diploma or its recognized equivalent;
6. Have not been convicted of a felony offense or any offense involving moral turpitude contrary to the laws of Georgia, any other state, or the United States; and
7. Have successfully completed the next scheduled class no longer than 180 days after such person's election or appointment a basic training course provided by the Georgia Police Academy.[75]

Additionally, coroners, as well as all deputy coroners,[76] are required to take a training course every year by the Georgia Coroner's Training Council[77] to maintain the status of a certified coroner.[78]

Where the county has abolished the county coroner office and replaced it with an office of the medical examiner, the governing authority of that county must appoint a medical examiner who will serve at the pleasure of the governing authority.[79] To be eligible for the office of medical examiner, the individual must:

1. Have a doctor of medicine degree and be licensed to practice medicine under the provisions of Chapter 34 of Title 43;

---

[73] O.C.G.A. § 45-16-80 (2004).
[74] O.C.G.A. § 45-16-1(a) (2004).
[75] O.C.G.A. § 45-16-1(b)(1) (2004).
[76] O.C.G.A. § 45-16-7(a), (b) (2004) (noting "[n]o person shall be eligible to hold office of deputy coroner unless he or she holds a high school diploma or its recognized equivalent").
[77] For a description of the composition of the Georgia Coroner's Training Council, see O.C.G.A. § 45-16-62 (2004), and Georgia Coroner's Association, Training Council, *at* http://www.georgiacoronersassoc.org/trainingco.html (last visited on Oct. 5, 2005).
[78] O.C.G.A. §§ 45-16-6, -66 (2004) (noting that the training course should not be less than 16 hours per year).
[79] O.C.G.A. § 45-16-80(e) (2004).

2. Be eligible for certification by the American Board of Pathology; and
3. Have at least one year of medico-legal training or one year of active experience in a scientific field in which legal or judicial procedures are involved at the county, state, or federal level.[80]

The governing authority of the county may initially waive requirements #2-3 for any individual, but such waiver may not extend beyond one year.[81]

b. Powers and Duties of the Coroner and County Medical Examiner

In counties that have replaced the office of the coroner with the office of the medical examiner, the county medical examiner will possess all of the powers and responsibilities traditionally delegated to the coroner, except the county medical examiner will not have the right to "summon and impanel a jury to hold inquests."[82] "Any coroner or county medical examiner may delegate to a local medical examiner,[83] forensic consultant,[84] or medical examiner's investigator[85] the power to perform those duties of such coroner or medical examiner . . . if the person to whom such power is thus delegated meets the applicable requirements . . . for the performance of such duties."[86]

Among the coroner's or county medical examiner's responsibilities is ordering a medical examiner's inquiry into the death[87] of any person who died (1) as a result of violence; (2) by suicide or casualty; (3) suddenly when in apparent good health; (4) when unattended by a physician; (5) in any suspicious or unusual manner, with particular attention to those person 16 years of age and under; (6) after birth but before seven years of age if the death is unexplained; (7) as a result of an execution carried out pursuant to the imposition of the death penalty; (8) while an inmate of a state hospital or a state county, or city penal

---

[80] O.C.G.A. § 45-16-80(c) (2004); *see also* O.C.G.A. § 45-16-80(i) (2004) (noting that the appointed county medical examiner is not required to meet any county residency requirements).

[81] O.C.G.A. § 45-16-80(d) (2004).

[82] O.C.G.A. § 45-16-80(f), (g) (2004); *see also* O.C.G.A. § 45-16-21(6) (2004) (defining "inquest" as "an official judicial inquiry before a coroner and coroner's jury for the purpose of determining the cause of death"); O.C.G.A. § 45-16-33 (2004).

[83] A "local medical examiner" must be "a licensed physician appointed by the state medical examiner to perform scene investigations, external examinations, limited dissections, autopsies, or any combinations of such duties." *See* O.C.G.A. § 45-16-23(b) (2004).

[84] A "forensic consultant" must be "an expert in a field of forensic science, including but not limited to odontology or anthropology, appointed and authorized by the state medical examiner to examine human remains and evidence under the medical examiner's jurisdiction." *See* O.C.G.A. § 45-16-23(c) (2004).

[85] A "medical examiner's investigator" must be "a person employed by a medical examiner to perform duties of such medical examiner with the same authority as the medical examiner while at the scene of death and during subsequent investigation, except that no medical examiner's investigator is authorized to make any arrest or perform official external examinations, limited dissections, or autopsies." *See* O.C.G.A. § 45-16-23(d) (2004).

[86] O.C.G.A. § 45-16-23(a) (2004).

[87] O.C.G.A. § 45-16-24(b) (2004).

institution; or (9) after having been admitted to a hospital in an unconscious state and without regaining consciousness within 24 hours of admission.[88]

The medical examiner's inquiry must be conducted by a medical examiner, which includes the Chief Medical Examiner, a regional medical examiner, a county medical examiner, a local medical examiner, or any person who is employed by the state and appointed as a medical examiner as of December 1, 1989.[89] The inquiry may include a scene investigation, an external examination, a limited dissection, an autopsy, or any combination thereof.[90] But, the inquiry must be reduced to writing[91] and the medical examiner and coroner must file with the Director of the Division a report of each medical examiner's inquiry and coroner's investigation.[92] If a report indicates a suspicion of foul play, all specimens, samples, or evidence must be transmitted to the Division for analysis.[93]

---

[88] O.C.G.A. §§ 45-16-24(a), -25(a)(1) (2004).
[89] O.C.G.A. § 45-16-21(9) (2004).
[90] O.C.G.A. § 45-16-21(10) (2004).
[91] O.C.G.A. § 45-16-24(d) (2004).
[92] O.C.G.A. § 45-16-32 (2004).
[93] *Id.*

II. ANALYSIS

A. Recommendation #1

> **Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.**

The State of Georgia does not require crime laboratories or medical examiner offices to be accredited. All of the crime laboratories of the Division of Forensic Sciences of the Georgia Bureau of Investigation (the Division), however, are currently accredited by the Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) and/or possess ISO/IEC 17025 accreditation through the Forensic Quality Services-International Division of the National Forensic Science Technology Center (FQS-I).[94]

Both accreditation programs require laboratory personnel to possess certain qualifications.[95] For example, the ASCLD/LAB Laboratory Accreditation Board 2003 Manual requires the examiners to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments and methods and procedures.[96] The examiners must also successfully complete a competency test prior to assuming casework responsibility and successfully complete annual proficiency tests.[97]

Additionally, a review of the Division's annual reports indicates that the Division provides training programs for new examiners to ensure that they possess the necessary knowledge and skills to perform the required tasks. Specifically, the Division's 1999 Annual Report states: "A training plan was developed that allowed support staff, such as laboratory assistants, evidence-receiving technicians and forensic pathologists, to come on board and begin working within 30 days of hire. The training programs for scientists were lengthier—four months for toxicologists and three months for chemists."[98] The Division's 2000 Annual Report further indicates that after completing the three to four months of training, the scientists "successfully completed the necessary knowledge, skills and abilities requirements to perform complex scientific testing and courtroom

---

[94] FSQ-I Programs, ISO/IEC Accredited Laboratories, *at* http://www.forquality.org/accreditation.htm#atlanta (last visited on Oct. 5, 2005).

[95] *See supra* notes 37-38, 61.

[96] ASCLD/LAB 2003 MANUAL, *supra* note 16, at 37-50.

[97] *Id.*

[98] Georgia Bureau of Investigation, Division of Forensic Sciences, 1999 Annual Report, *at* http://www.ganet.org/gbi/99annual/99ar_dofs.html (last visited on Oct. 5, 2005).

testimony."[99] The Division's 2001 and 2002 annual reports state, "During FY'01, additional instruction was given to the scientists to complete training in their respective fields of forensic science."[100]

Both accreditation programs also require laboratories to take certain measures to ensure the validity, reliability and timely analysis of forensic evidence. For example, the ASCLD/LAB program requires the laboratory to have clearly written procedures for handling and preserving the integrity of evidence; preparing, storing, securing and disposing of case records and reports; and for maintaining and calibrating equipment.[101] Similarly, the ISO/IEC 17025 program requires the laboratory to establish and maintain procedures for identifying, collecting indexing, accessing, filing, storing, maintaining and disposing of quality and technical reports.[102] Both programs require these procedures to be included in the laboratory's quality manual.[103] Neither program, however, explicitly requires the laboratory to publish its procedures.

Similarly, Georgia law requires the Division to establish "written standards and procedures for the administration of forensic testing,"[104] which may include "standards for the identification, collection, transportation, and analysis of forensic evidence."[105] These standards, however, do not have to be "published or made available for public inspection" in order to become effective, because the General Assembly made such standards exempt from the Georgia Administrative Procedure Act.[106] We note that the Division has established and posted on its website a manual entitled "Laboratory Services and Requirements for Submitting Evidence," but the manual focuses on the "process of submitting evidence to [Division] laboratories" rather than the analysis of evidence by the laboratories.[107]

---

[99] Georgia Bureau of Investigation, Division of Forensic Sciences, 2000 Annual Report, *at* http://www.ganet.org/gbi/00annual/00ar_dofs.html (last visited on Oct. 5, 2005).

[100] Georgia Bureau of Investigation, Division of Forensic Sciences, 2001 Annual Report, *at* http://www.ganet.org/gbi/01annual/01ar_dofs.html (last visited on Oct. 5, 2005); Georgia Bureau of Investigation, Division of Forensic Sciences, 2002 Annual Report, *at* http://www.ganet.org/gbi/02annual/DOFS_FY02.pdf (last visited on Oct. 5, 2005).

[101] ASCLD/LAB 2003 MANUAL, *supra* note 16, at 21.

[102] FQS-I, ISO/IEC 17025 ACCREDITATION STANDARDS, *supra* note 51, at 21.

[103] The ISO/IEC 17025 program specifically requires the laboratory quality manual to "include or make reference to the supporting procedures including technical procedures." *Id* at 12. Similarly, the ASCLS/LAB program requires the quality manual to contain or reference the documents or policies/procedures pertaining, but not limited to, the following: (1) control and maintenance of documentation of case records and procedure manuals, (2) validation of test procedures used, (3) handling evidence, (4) use of standards and controls in the laboratory, (5) calibration and maintenance of equipment, (6) practices for ensuring continued competence of examiners, and (7) taking corrective action whenever analytical discrepancies are detected. ASCLD/LAB 2003 MANUAL, *supra* note 16, at 23-24.

[104] O.C.G.A. § 35-3-154(1) (2004).

[105] O.C.G.A. § 35-3-151(3) (2004).

[106] O.C.G.A. § 35-3-155 (2004); *see also* O.C.G.A. § 50-13-03(b) (2004).

[107] *See* Georgia Bureau of Investigation, Division of Forensic Services, Laboratory Services and Requirements for Submitting Evidence, *at* http://www.ganet.org/gbi/labmanual.html (last visited on Oct. 5, 2005).

With respect to medical examiner offices, we were unable to obtain sufficient information to state with any degree of certainty whether any medical examiner offices are currently accredited or have adopted standardized procedures for medical examinations. Georgia law, however, requires all medical examiners to possess certain qualification standards. For example, the Chief Medical Examiner is required to be a pathologist certified in forensic pathology by the American Board of Pathology and all regional medical examiners must be pathologists.[108] Additionally, in an effort to ensure the validity and reliability of medical examiners' inquiries and coroners' investigations, Georgia law requires all medical examiners and coroners to file a report of each medical examiner's inquiry and coroner's investigation with the Division, which then reviews the reports for foul play and in cases of foul play, re-tests any specimen, samples, or evidence.[109]

Based on this information, the State of Georgia is only in partial compliance with Recommendation #1.

B. Recommendation #2

Crime laboratories and medical examiner offices should be adequately funded.

A review of the Division's annual reports indicates a personnel shortage and case backlog as a result of "budget shortfalls," "budget constraints," and a "growing caseload."[110] The Division's 2004 annual report states: "Despite carrying an average of 40 vacancies, principally due to budget shortfalls, [the Division] produces more than 88,114 reports."[111] The report continues as follows: "The individual caseload for scientists remains high, but the overall case production of [the Division] has fallen well short of the demand for services. The result is a greatly increased backlog over the previous year. The backlog is expected to be in excess of 36,000 cases by the end of FY'05."[112] Given that Division crime laboratories are experiencing "budget shortfalls" and "budget constraints," it does not appear as if the Division is adequately funded.

---

[108] *See supra* notes 69, 71, 80 and accompanying text.

[109] O.C.G.A. § 45-16-32 (2004).

[110] Georgia Bureau of Investigation, Division of Forensic Services, Crime Lab Annual Report 2004, *at* http://www.ganet.org/gbi/04annual/DOFS_FY04.pdf (last visited on Oct. 5, 2005); Georgia Bureau of Investigation, Division of Forensic Services, Crime Lab Annual Report 2003, *at* http://www.ganet.org/gbi/03annual/DOFS_FY03.pdf (last visited Sept. 26, 2004) (noting the 40 vacancies due to budget shortfalls and indicating that "[w]ith additional constraints (due to a weak economy) and a growing caseload, [the Division] will most likely develop a backlog larger than the one that existed in FY'01 (36,000 cases)."); Georgia Bureau of Investigation, Division of Forensic Services, Crime Lab Annual Report 2002, *at* http://www.ganet.org/gbi/02annual/DOFS_FY02.pdf (last visited on Oct. 5, 2005) (noting "with additional budget constraints (due to a weak economy) and the increased caseload, the laboratory has begun to developa [sic] backlog that continues to grow.")

[111] Georgia Bureau of Investigation, Division of Forensic Services, Crime Lab Annual Report 2004, *at* http://www.ganet.org/gbi/04annual/DOFS_FY04.pdf (last visited on Oct. 5, 2005).

[112] *Id.*

We were, however, unable to obtain sufficient information to appropriately assess the adequacy of the funding provided to both Division crime laboratories and medical examiner offices.

CHAPTER FIVE

PROSECUTORIAL PROFESSIONALISM

INTRODUCTION TO THE ISSUE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversary system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.

Because prosecutors are decision makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice." Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous additional discretion deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.

While the great majority of prosecutors are ethical, law-abiding individuals who seek justice, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. Between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.[1]

Prosecutorial misconduct can encompass various actions, including but not limited to failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, racially discriminating in making peremptory challenges, covering-up and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.[2] The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

In order to curtail prosecutorial misconduct and to reduce the number of wrongly convicted individuals, federal, state, and local governments must provide adequate funding to prosecutors' offices, adopt standards to ensure manageable workloads for

---

[1] *See* STEVE WEINBERG, CENTER FOR PUBLIC INTEGRITY, BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT? (2004), *available at* http://www.publicintegrity.org/pm/ (Jan. 5, 2006).

[2] *Id.*; *see also* Police and Prosecutorial Misconduct, Innocence Project, *at* http://www.innocenceproject.org/causes/policemisconduct.php (Jan. 5, 2006).

prosecutors, and require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or prosecution. Perhaps most importantly, there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.

I. FACTUAL DISCUSSION

The State of Georgia is divided into forty-nine judicial circuits.[3] Each judicial circuit has an elected district attorney[4] who is charged with representing the state in all felony criminal cases in the superior courts of the circuit and on appeal.[5] Each district attorney's office has "a full-time staff of assistant district attorneys, investigators, victim assistance and administrative personnel who assist the district attorney in carrying out the duties of the office."[6] District attorneys' offices differ in size and have correspondingly different internal office procedures.[7] Although there are no statewide procedures that govern the operation of district attorney's offices, the State of Georgia has established the "Prosecuting Attorneys' Council"[8] to "assist the prosecuting attorneys throughout the state in their efforts against criminal activity in the state."[9]

A. The Prosecuting Attorneys' Council

In 2005, the Prosecuting Attorneys' Council (PAC) established a capital litigation section within its office to provide assistance to prosecutors handling capital cases, but the section is not currently funded.[10] In the meantime, PAC remains authorized to assist prosecuting attorneys throughout the state by:

1. Obtaining, preparing, supplementing, and disseminating indexes to and digests of the decisions of the Georgia Supreme Court and the

---

[3] Judicial Branch of Georgia, Administrative Office of the Courts, *at* http://www.georgiacourts.org/courts/ (last visited on Dec. 15, 2005).

[4] *See* GA. CONST. art. 6, § 8, para. 1 (stating that district attorneys are "elected circuit-wide for a term of four years"); *see also* O.C.G.A. § 15-18-3 (2005) (containing the requisite qualifications for becoming a district attorney).

[5] *See* GA. CONST. art. 6, § 8, para. 1; *see also* O.C.G.A. § 15-18-6 (2005) (containing a detailed explanation of the duties of a district attorney); Prosecuting Attorneys' Council, About PAC, *at* http://www.pacga.org/about/ (last visited on Dec. 27, 2005).

[6] *See* Prosecuting Attorneys' Council, About PAC, *at* http://www.pacga.org/about/ (last visited on Dec. 27, 2005); O.C.G.A. § 15-18-14 (2005) (discussing procedures for the appointment of assistant district attorneys).

[7] Email from Chuck Olson, General Counsel, Prosecuting Attorneys' Council, to Anne Emanuel, Associate Dean for Academic Affairs and Professor of Law, Georgia State University College of Law (Nov. 21, 2005) (on file with author); *see also* Prosecuting Attorneys' Council, *at* http://www.pacga.org/ (last visited on Dec. 15, 2005) (click on "Find a Prosecutor" and then "List All District Attorneys" for a listing of prosecutors throughout the state).

[8] PAC is composed of nine members, six of whom must be district attorneys and three of whom must be solicitors or solicitors-general of courts of record. *See* O.C.G.A. § 15-18-41(a) (2005); *see also* O.C.G.A. § 15-18-41(c) (2005) (noting that the term of office of each member of the council shall be for a period of four years); Prosecuting Attorneys' Council, Council Members, *at* http://www.pacga.org/about/council.shtml (last visited on Dec. 27, 2005) (including the names, titles, and e-mail addresses for all nine council members).

[9] O.C.G.A. § 15-18-40(b) (2005).

[10] E-mails from Chuck Olson, General Counsel, Prosecuting Attorneys' Council, to Anne Emanuel, Associate Dean for Academic Affairs and Professor of Law, Georgia State University College of Law (Oct. 11, 2005 and Nov. 15, 2005) (on file with author).

Court of Appeals of Georgia and other courts, statutes, and legal authorities relating to criminal matters;

2. Preparing and distributing a basic prosecutor's manual and other educational materials;
3. Preparing and distributing model indictments, search warrants, interrogation devices, and other common and appropriate documents employed in the administration of criminal justice at the trial level;
4. Promoting and assisting with the training of prosecuting attorneys;
5. Providing legal research assistance to prosecuting attorneys;
6. Providing such assistance to law enforcement agencies as may be lawful; and
7. Providing such other assistance to prosecuting attorneys as may be authorized by law.[11]

PAC is also "authorized to conduct or approve for credit or reimbursement, or both, basic and continuing legal education courses or other appropriate training programs for the district attorneys, solicitors-general, and other prosecuting attorneys [in Georgia] and the members of the staffs of such officials."[12] PAC "offers general and specialized Georgia State Bar CLE-accredited training courses for the professional development needs of Georgia prosecutors as they progress through their careers as public attorneys."[13] The training courses include but are not limited to the "Fundamentals of Prosecution,"[14] which is for new prosecutors; a course dedicated to prosecuting capital crimes, which is offered two out of every three years;[15] and the Winter and Summer Conferences, which

---

[11] O.C.G.A. § 15-18-40(b)(1)-(7) (2005).

[12] O.C.G.A. § 15-18-45(a) (2005).

[13] Prosecuting Attorneys' Council, Training, *at* http://www.pacga.org/departments/training.shtml (last visited on Dec. 30, 2005).

[14] Prosecuting Attorneys' Council, Fundamentals of Prosecution, *at* http://www.pacga.org/downloads/training/2005_fundament_pros/announce_&_registr.pdf (last visited on Dec. 27, 2005) (noting that "[p]rosecutors admitted to practice in the State of Georgia on or after July 1, 2005, who are participating in the Transition into Prosecution Program [of the State Bar of Georgia], must attend Fundamentals of Prosecution within 12 months of the date of their admission to the Bar. Prosecutors who passed the Bar prior to July 1, 2005, but have not attended the ICLE "Bridge the Gap" seminar may participate in Fundamentals of Prosecution in lieu of attending "Bridge the Gap."); *see also* STATE BAR OF GA., 2005-2006 HANDBOOK R. 8-104, at H-143, *available at* http://www.gabar.org/handbook/part_viii_continuing_lawyer_competency/rule_8-104_education_requirements_and_exemptions/ (last visited on Dec. 27, 2005) (including the continuing legal education requirements and exemptions).

[15] E-mail Interview with Richard Malone, Executive Director, Prosecuting Attorneys' Council, and Joe Burford, Director of Trial Support, Prosecuting Attorneys' Council (April 14, 2005); *see, e.g.*, Prosecuting Attorneys' Council, 2005 Winter Conference and 2005 Introduction to Drug Prosecution Course, After-Report and Photo Gallery, *at* http://www.pacga.org/training/2005_wc_photo_gallery.htm (last visited on Dec. 27, 2005) (noting that the "District Attorney's track ranged from Capital Litigation Resources to Exercising Guided Discretion").

are offered each year.[16] The agenda for the next PAC conference—Winter Conference 2006—includes training on crime scene investigation, analyzing evidence and developing strategies and techniques to most effectively present the evidence, and the legal, ethical, and professional standards applicable to Georgia prosecutors.[17]

In addition to the ethical training provided by PAC, the State Bar of Georgia (the State Bar) has created the Georgia Rules of Professional Conduct, which specifically address the professional and ethical responsibilities of prosecutors.

B. The Georgia Rules of Professional Conduct

The Georgia Rules of Professional Conduct state that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[18] To ensure that these obligations are met, Rule 3.8 of the Georgia Rules of Professional Conduct requires a prosecutor in a criminal case to comply with a number of requirements, including but not limited to: (1) refraining from prosecuting a charge that the prosecutor knows is not supported by probable cause, and (2) making timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense.[19] The maximum penalty for violating this rule is a public reprimand.[20]

The Georgia Rules of Professional Conduct also require all attorneys, including prosecutors, to report professional misconduct. Rule 8.3 of the Georgia Rules of Professional Conduct specifically states, "[a] lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a

---

[16] E-mail Interview with Richard Malone, Executive Director, Prosecuting Attorneys' Council, and Joe Burford, Director of Trial Support, Prosecuting Attorneys' Council (April 14, 2005).

[17] Prosecuting Attorneys' Council, Winter Conference Tentative Agenda, *at* http://www.pacga.org/downloads/training/2006_winter/2006_wc_agenda.pdf (last visited on Dec. 27, 2005).

[18] GA. RULES OF PROF'L CONDUCT R. 3.8 cmt., *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_38_special_responsibilities_of_a_prosecutor/ (last visited on Dec. 27, 2005) (describing the special responsibilities of a prosecutor).

[19] GA. RULES OF PROF'L CONDUCT R. 3.8, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_38_special_responsibilities_of_a_prosecutor/ (last visited on Dec. 27, 2005).

[20] *Id.*; *see also* GA. RULES OF PROF'L CONDUCT R. 4-102, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_4-102_disciplinary_action_levels_of_discipline_standards/ (last visited on Dec. 19, 2005) (describing the specifics of a public reprimand).

lawyer in other respects, should inform the appropriate professional authority."[21] The power to investigate grievances and to discipline members of the State Bar is vested in the State Disciplinary Board,[22] which is composed of the Investigative Panel and the Review Panel, and a Consumer Assistance Program.[23]

The Investigative Panel has the authority to initiate grievances on its own, but also is required to receive and evaluate grievances against State Bar members.[24] All grievances other than those initiated by the Georgia Supreme Court, the Investigative Panel, or inquiries that may be filed with the Consumer Assistance Program must be first filed with the Office of the General Counsel of the State Bar, which has the authority to screen grievances to determine whether they are "unjustified, frivolous, patently unfounded or fail[] to state facts sufficient to invoke the disciplinary jurisdiction of the State Bar of Georgia."[25]

C. Relevant Prosecutorial Responsibilities

1. Notice of Intent to Seek the Death Penalty

The State of Georgia gives district attorneys the discretion to seek the death penalty in any case in which the defendant is charged with aircraft hijacking or treason or where one of the ten aggravating factors contained in section 17-10-30 of the Official Code of Georgia Annotated is present.[26] If the decision is made to seek the death penalty, the

---

[21] GA. RULES OF PROF'L CONDUCT R. 8.3, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_83_reporting_professional_misconduct/ (last visited on Dec. 30, 2005).

[22] GA. RULES OF PROF'L CONDUCT R. 4-201, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/4-201_state_disciplinary_board/ (last visited on Dec. 30, 2005); *see also* GA. RULES OF PROF'L CONDUCT R. 4-202, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_4-202_receipt_of_grievances_initial_review_by_bar_counsel/ (last visited on Dec. 30, 2005) (discussing the receipt of grievances and the initial review by the Office of the General Counsel of the State Bar of Georgia).

[23] GA. RULES OF PROF'L CONDUCT R. 4-201, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/4-201_state_disciplinary_board/ (last visited on Dec. 30, 2005).

[24] GA. RULES OF PROF'L CONDUCT R. 4-202, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_4-202_receipt_of_grievances_initial_review_by_bar_counsel/ (last visited on Dec. 30, 2005).

[25] *Id.*

[26] Moore v. State, 243 S.E.2d 1, 6 (Ga. 1978) (referencing O.C.G.A. § 17-10-30(2005)); *see also* GA. UNIFIED APPEAL R. II(C)(1); Rower v. State, 443 S.E.2d 839, 841 (Ga. 1994) (citing Jones v. State, 440 S.E.2d 161 (Ga. 1994), and stating that "[a]bsent a showing that the district attorney acted in an unconstitutional manner with respect to his case, Rower may not inquire into the prosecutor's exercise of discretion in seeking the death penalty against him").

prosecutor must announce his/her decision at the pre-trial conference, which is held after the defendant is indicted but before his/her arraignment, and file a notice of intent with the clerk of the superior court.[27] Notices of intent can be withdrawn for any reason.[28]

2. Plea Bargaining

The Bibb County District Attorney's Office has recently implemented plea bargaining standards on a trial basis in an effort to ensure uniform plea bargains for all defendants in the same position.[29] The standards require that the defendant's information, including his/her offense and prior offenses, be entered into a database that generates a recommended plea bargain sentence.[30] It is unclear whether other district attorney's offices have standards for determining when a prosecutor may or may not offer a defendant a plea bargain.[31] The Prosecuting Attorneys' Council, however, does appear to provide training on plea bargaining during its "Fundamentals of Prosecution" course.[32]

3. Discovery

a. Discovery Requirements

State and federal law require the state to disclose evidence favorable to the defendant when such evidence is material either to the defendant's guilt or punishment ("*Brady*[33] material").[34] The prosecutor "is not required to deliver his[/her] entire file to defense counsel, but is required to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."[35] This includes the "disclosure of impeachment evidence which could be used to show bias or interest on the part of a key State witness. Accordingly, the State is under a duty to reveal any [deal or] agreement, even an informal one, with a witness concerning criminal charges pending against that

---

[27] GA. UNIFIED APPEAL R. II(C)(1).

[28] E-mail Interview with Richard Malone, Executive Director, Prosecuting Attorneys' Council, and Joe Burford, Director of Trial Support, Prosecuting Attorneys' Council (April 14, 2005); Interview with Tom Clegg, Clegg and Daniels LLC (July 25, 2005).

[29] Interview with Neil Alan Halvorson, Macon Judicial Circuit District Attorney's Office (Sept. 22, 2005).

[30] *Id.*

[31] *See, e.g.*, E-mail Interview with Richard Malone, Executive Director, Prosecuting Attorneys' Council, and Joe Burford, Director of Trial Support, Prosecuting Attorneys' Council (April 14, 2005).

[32] Prosecuting Attorneys' Council, Fundamentals of Prosecution, *at* http://www.pacga.org/downloads/training/2005_fundament_pros/announce_&_registr.pdf (last visited on Dec. 27, 2005)

[33] In *Brady v. Maryland*, the United States Supreme Court found that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[34] *Brady*, 373 U.S. at 87; Burgeson v. State, 475 S.E.2d 580, 583 (Ga. 1996).

[35] Schofield v. Palmer, 621 S.E.2d 726, 730 (Ga. 2005) (citing United States v. Bagley, 473 U.S. 667, 675 (1985)).

witness."[36] A prosecutor must not only disclose the evidence of which s/he is aware, but also "favorable evidence known to others acting on the government's behalf," even if the prosecutor is not personally aware of its existence.[37]

In addition, since January 1, 1995,[38] all defendants charged with at least one felony offense have had the option to participate in "reciprocal discovery" of witnesses, statements, reports, and evidence.[39] In order to participate in reciprocal discovery, the defendant must provide the prosecuting attorney with written notice of his/her decision at or prior to arraignment, or at such time as the court permits.[40] If the defendant gives notice of his/her decision to participate in reciprocal discovery, the requirements of reciprocal discovery will apply to the guilt/innocence phase of a capital trial as well as to the sentencing phase.[41]

Pursuant to the reciprocal discovery statutes, both the prosecuting attorney and the defendant are required to disclose to the opposing party certain evidence.[42] Specifically, the prosecuting attorney is required, no later than ten days prior to trial or as otherwise ordered by the court, to disclose, furnish, and/or permit the defendant to inspect, copy, or photograph the following evidence:

- Written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the state or prosecution;
- Any written record containing the substance of any relevant oral statements made by the defendant, before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer or member of the prosecuting attorney's staff;
- The substance of any other relevant oral statement made by the defendant, before or after arrest, in response to interrogating by any person then known by the

---

[36] Ford v. State, 614 S.E.2d 907, 908 (Ga. Ct. App. 2005); Giglio v. United States, 405 U.S. 150, 154-55 (1972); *Palmer*, 621 S.E.2d at 730 (citing *Bagley*, 473 U.S. at 675 and *Giglio*, 405 U.S. at 154-55).

[37] Kyles v. Whitley, 514 U.S. 419, 437-39 (1995); *Palmer*, 621 S.E.2d at 730-31.

[38] In 1994, the Georgia Legislature adopted the Criminal Procedure Discovery Act, in an effort to provide for the "comprehensive regulation of discovery and inspection in criminal cases." 1994 Ga. Laws 1252. The Act became effective on January 1, 1995. *Id.* Prior to 1995, the State of Georgia did not have any comprehensive statute or rule pertaining to discovery in criminal cases. *See* State v. Lucious, 518 S.E.2d 677, 679 (Ga. 1999).

[39] O.C.G.A. §§ 17-16-1 to -10 (2005).

[40] O.C.G.A. § 17-16-2 (2005). In cases in which at least one felony is charged which was docketed, indicted, or in which an accusation was returned prior to January 1, 1995, the defendant may participate in reciprocal discovery only if both the defendant and the prosecuting attorney agree in writing to participate. *See* O.C.G.A. § 17-16-2(e) (2005). If such defendant does not opt to participate in reciprocal discovery, s/he has a right to the discovery afforded in sections 17-16-20 through 17-16-23 of the Official Code of Georgia Annotated. *See* O.C.G.A. § 17-16-20 (2005).

[41] O.C.G.A. § 17-16-2(f) (2005).

[42] *See* O.C.G.A. §§ 17-16-4, -5, -7, -8 (2005) (delineating the requirements for participating in "reciprocal discovery").

defendant to be a law enforcement officer or member of the prosecuting attorney's staff if the state intends to use that statement at trial;

- The substance of any other relevant written or oral statement made by the defendant while in custody, whether or not in response to interrogation;
- Statements of co-conspirators that are attributable to the defendant and arguably admissible against the defendant at trial;
- A copy of the defendant's Georgia Crime Information Center criminal history, if any, as is within the possession, custody, or control of the state or prosecution;
- Books, papers, documents, photographs, tangible objects, audio and video tapes, films and recordings, buildings or places, or copies or portions of any of these things which are in the possession, custody, or control of the state or prosecution and are intended for use by the prosecuting attorney as evidence in the prosecution's case-in-chief or rebuttal at the trial or were obtained from or belong to the defendant;
- A report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the state intends to introduce in evidence in its case-in-chief or in rebuttal the results of the examinations or tests. If the report is oral or partially oral, the prosecuting attorney must reduce all relevant and material information to writing. This does not include any other material, note, or memorandum relating to the psychiatric or psychological treatment or therapy of any victim or witness;
- Any evidence in aggravation of punishment that the state intends to introduce in sentencing; and
- The names, current locations, dates of birth, and telephone numbers of the prosecuting attorney's witnesses, unless for good cause the judge allows an exception to this requirement, in which event the defense attorney must be afforded an opportunity to interview such witnesses prior to the witnesses being called to testify.[43]

The defendant within ten days of timely compliance by the prosecuting attorney, but no later than five days prior to the trial or as otherwise ordered by the court, must disclose, furnish, and/or permit the prosecuting attorney to inspect, copy, or photograph the following evidence:

- Books, papers, documents, photographs, tangible objects, audio and video tapes, films and recordings, buildings or places, or copies or portions of any of these things which are in the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in the defendant's case-in-chief or rebuttal at the trial;

---

[43] O.C.G.A. §§ 17-16-4(a)(1)-(5), -8(a) (2005). Section 17-16-8(b), however, does not require the prosecution to provide the home address, home telephone number, and date of birth of a witness who is a law enforcement officer. O.C.G.A. §§ 17-16-8(b) (2005). The prosecution must instead provide the law enforcement officer's current work location and work phone number. *Id.*

- A report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the defendant intends to introduce in evidence in its case-in-chief or in rebuttal the results of the examinations or tests. If the report is oral or partially oral, the defendant must reduce all relevant and material information to writing. This does not include any other material, note, or memorandum relating to the psychiatric or psychological treatment or therapy of any defendant or witness; and
- The names, current locations, dates of birth, and telephone numbers of the defense witnesses, unless for good cause the judge allows an exception to this requirement, in which event the prosecuting attorney must be afforded an opportunity to interview such witnesses prior to the witnesses being called to testify.[44]

Additionally, both parties, no later than ten days prior to trial or at such time as the court permits, or at the time of any post-indictment pretrial evidentiary hearing other than a bond hearing, must provide the opposing party with any witness statement that is in the possession, custody, or control of the party, that relates to the subject matter concerning the testimony of the witness, and that the party in possession, custody, or control of the statement intends to call as a witness at trial or at such post-indictment pretrial evidentiary hearing.[45]

In cases in which the defendant does not elect to participate in "reciprocal discovery," the defendant is entitled only to the discovery afforded "by the Georgia and United States Constitutions, statutory exceptions to the Act, and non-conflicting rules of court."[46] This includes, but is not limited to, a list of witnesses from the grand jury, *Brady* material, pre-trial examination of known handwriting samples, and records under the Open Records Act.[47] It does not, however, include discovery of the state's scientific reports, scientific work product, or trial witness lists.[48]

b. Challenges to Discovery Violations

If either party fails to comply with the requirements of reciprocal discovery, the judge has the "'discretion to take any listed corrective action it deems appropriate,'"[49] including ordering the non-complying party to allow the discovery or inspection of discoverable materials.[50] If the defendant makes a showing of "prejudice and bad faith," the judge has

---

[44] O.C.G.A. §§ 17-16-4(b)(1)-(2), -8(a) (2005).
[45] O.C.G.A. § 17-16-7 (2005).
[46] *See* State v. Lucious, 518 S.E.2d 677, 679 (Ga. 1999).
[47] Blevins v. State, 606 S.E.2d 624, 628 (Ga. Ct. App. 2004); *Lucious*, 518 S.E.2d at 684-85 (Fletcher, J., concurring in part and dissenting in part).
[48] *Lucious*, 518 S.E.2d at 681-82.
[49] Brown v. State, 601 S.E.2d 405, 408 (Ga. 2004) (citing Jones v. State, 554 S.E.2d 238, 240 (Ga. Ct. App. 2001)).
[50] O.C.G.A. § 17-16-6 (2005); McMorris v. State, 588 S.E.2d 817, 821 (Ga. Ct. App. 2003).

the discretion to prohibit the introduction of the undisclosed evidence or to prohibit the undisclosed witnesses from testifying.[51]

Following the trial, a defendant may obtain relief for the prosecution's failure to disclose *Brady* material at trial by showing that: (1) the state possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not obtain it himself with any reasonable diligence; (3) the state suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different.[52]

The judge's decision to take corrective action (or not to take corrective action) based on a discovery violation, *Brady* or otherwise, is reviewed under the abuse of discretion standard.[53] The trial court's failure to take corrective action based on a discovery violation committed by the state is "'subject to scrutiny for harmless error'"[54] and "constitutes reversible error only if the violation harmed the defendant's ability to prepare and present his[/her] defense or otherwise deprived him[/her] of a fair trial."[55]

4. Limitations on Arguments

a. Guilt/Innocence Phase

A prosecutor's opening argument is limited to "expected proof by legally admissible evidence."[56] On the other hand, prosecutors are "granted wide latitude in conducting closing argument[s],"[57] but there are certain limitations, "the first and foremost of which is the longstanding prohibition against 'the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence.'"[58] For example, prosecutors may not ask the jury to "place themselves in a victim's position"[59] or comment on the

---

[51] O.C.G.A. § 17-16-6 (2005); *McMorris*, 588 S.E.2d at 821; *see also* Brown v. State, 601 S.E.2d 405, 408 (Ga. Ct. App. 2004); Davis v. State, 571 S.E.2d 497, 500 (Ga. Ct. App. 2002) (noting that "[i]n the absence of evidence showing prejudice to the defendant and bad faith by the State, the harsh sanction of excluding evidence improperly withheld from the defense under OCGA § 17-16-6 is not available").

[52] Schofield v. Palmer, 621 S.E.2d 726, 731 (Ga. 2005); Burgeson v. State, 475 S.E.2d 580, 583 (Ga. 1996).

[53] Jones v. State, 2005 WL 3303954, at *4 (Ga. Dec. 7, 2005); Ely v. State, 621 S.E.2d 811, 814 (Ga. Ct. App. 2005) (citing Brown v. State, 512 S.E.2d 369, 372 (Ga. Ct. App. 1999)); *Davis*, 571 S.E.2d at 500 (citing Williams v. State, 485 S.E.2d 837, 838 (Ga. Ct. App. 1997)).

[54] *Brown*, 601 S.E.2d at 408 (citing Williams v. State, 568 S.E.2d 132, 135 (Ga. 2002)); *see also* Hill v. State, 502 S.E.2d 505, 506-07 (Ga. 1998).

[55] *Jones*, 2005 WL 3303954, at *2; Gresham v. State, 462 S.E.2d 370, 371 (Ga. 1995); Bertholf v. State, 482 S.E.2d 469, 470 (Ga. Ct. App. 1997).

[56] GA. UNIF. SUPER. CT. R. 10.2.

[57] Clonts v. State, 579 S.E.2d 1, 4 (Ga. Ct. App. 2001) (quoting Arnold v. State, 545 S.E.2d 312, 318 (Ga. Ct. App. 2001)); Wisdom v. State, 217 S.E.2d 244, 249 (Ga. 1975).

[58] Bell v. State, 439 S.E.2d 480, 481 (Ga. 1994).

[59] Braithwaite v. State, 572 S.E.2d 612, 615 (Ga. 2002).

defendant's failure to testify during the guilt phase of the trial.[60] Similarly, prosecutors may not express their personal belief about the defendant's guilt.[61] However, prosecutors are permitted to "argue the defendant's guilt as a conclusion from the evidence."[62]

b. Sentencing Phase

Prosecutors may not argue during the penalty phase of a death penalty trial that the ultimate decision to impose a death sentence rests with a court higher than the trial court.[63] Prosecutorial arguments held to be proper, however, include future dangerousness,[64] the possibility of parole,[65] and telling the jury to reject mercy.[66]

c. Challenges to Prosecutorial Arguments

Georgia law provides that "[w]here counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same."[67] If the other party objects to the prejudicial statement, the judge must also "rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his[/her] discretion, [s/]he may order a mistrial if the prosecuting attorney is the offender."[68] "'The extent of a rebuke and instruction is within the discretion of the court . . . .'"[69]

The trial court's ruling to remedy (or not remedy) an improper statement that is objected to at trial is subject to a harmless error analysis on appeal. In order for constitutional

---

[60] O.C.G.A. § 24-9-20 (2005) (stating that "[t]he failure of a defendant to testify shall create no presumption against him or her, and no comment shall be made because of such failure"); Raheem v. State, 560 S.E.2d 680, 685 (Ga. 2002); Gosha v. State, 235 S.E.2d 527, 528 (Ga. 1977).

[61] Castell v. State, 301 S.E.2d 234, 247 (Ga. 1983); Forster v. State, 4 S.E.2d 498, 498-99 (Ga. Ct. App. 1939).

[62] Blue v. State, 316 S.E.2d 862, 863 (Ga. Ct. App. 1984).

[63] *See* Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985) (concluding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere"); Gilreath v. State, 279 S.E.2d 650, 663 (Ga. 1981) (noting that a "prosecutor's argument, over objection, that the jury should impose the death penalty and assume it will be set aside if not warranted, absent curative instructions, would require reversal"). *But see* Johnson v. State, 519 S.E.2d 221, 230-31 (Ga. 1999) (finding that the prosecutor's comment that jury should not be "swayed by pleas for mercy and sympathy and let mercy and sympathy come from a 'higher Court,'" was permissible, since it clearly referred to a higher spiritual power and not an appellate court).

[64] *Johnson*, 519 S.E.2d at 231 (citing Pye v. State, 505 S.E.2d 4 (Ga. 1998)).

[65] Jenkins v. State, 458 S.E.2d 477, 478 (Ga. 1995).

[66] *Johnson*, 519 S.E.2d at 230-31 (citing Hicks v. State, 352 S.E.2d 762 (Ga. 1987)).

[67] O.C.G.A. § 17-8-75 (2005).

[68] *Id.*; *see also* Louis v. State, 364 S.E.2d 607, 60809 (Ga. Ct. App. 1988) (exemplifying that the language "prosecuting attorney" found in section 17-8-75 is not limited to prosecuting attorneys but also includes defense counsel and co-defendant's counsel thereby granting the judge discretion to declare a mistrial when defense counsel or co-defendant's counsel is the offender).

[69] Love v. State, 325 S.E.2d 449, 450 (Ga. Ct. App. 1984) (citing Benefield v. State, 232 S.E.2d 89, 92 (Ga. Ct. App. 1976)).

error to be deemed harmless, the state must prove beyond a reasonable doubt that the error did not contribute to the verdict.[70] The standard for determining harmless non-constitutional error is whether "it is highly probable that the error . . . did not contribute to the jury's verdict."[71]

---

[70] Willingham v. State, 622 S.E.2d 343 (Ga. 2005).

[71] Sears v. State, 386 S.E.2d 360, 362 (Ga. 1989); *see also* Johnson v. State, 230 S.E.2d 869, 870-71 (Ga. 1976).

II. ANALYSIS

A. *Recommendation #1*

Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.

The State of Georgia does not require district attorney's offices to have written policies governing the exercise of prosecutorial discretion. The State Bar of Georgia, however, has established the Georgia Rules of Professional Conduct (the rules), which address prosecutorial discretion in the context of the role and responsibilities of prosecutors.[72] The rules describe the prosecutor's role as that of a "minister of justice and not simply that of an advocate" and advise the prosecutor to "see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[73] The rules require prosecutors to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause and to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense.[74] Similarly, the Prosecuting Attorneys' Council offers courses discussing the concept of guided prosecutorial discretion (i.e., 2005 Winter Conference).[75]

Although the State Bar and the Prosecuting Attorneys' Council highlight the need for guided prosecutorial discretion, the State of Georgia does not require district attorney's offices to have written policies governing the exercise of prosecutorial discretion. Based on this information, the State of Georgia fails to meet Recommendation #1. We note that we were unable to ascertain whether each district attorney's office has written policies governing the exercise of prosecutorial discretion.

Currently, the State of Georgia gives district attorneys the discretion to seek the death penalty in any case in which the defendant is charged with aircraft hijacking or treason or where one of the ten aggravating factors contained in section 17-10-30 of the Official Code of Georgia Annotated (O.C.G.A.)[76] is present.[77] The number of aggravating factors

---

[72] GA. RULES OF PROF'L CONDUCT R. 3.8 cmt., *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_38_special_responsibilities_of_a_prosecutor/ (last visited on Jan. 5, 2006).

[73] *Id.*

[74] GA. RULES OF PROF'L CONDUCT R. 3.8, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_38_special_responsibilities_of_a_prosecutor/ (last visited on Jan. 5, 2006).

[75] Prosecuting Attorneys' Council, 2005 Winter Conference and 2005 Introduction to Drug Prosecution Course, After-Report and Photo Gallery, *at* http://www.pacga.org/training/2005_wc_photo_gallery.htm (last visited on Jan. 5, 2006).

[76] O.C.G.A. § 17-10-30 (2005).

as well as the scope of the "outrageously or wantonly vile, horrible, or inhuman" aggravator (section 17-10-30(b)(7) of the O.C.G.A),[78] make virtually any murder a death-eligible offense.

Apart from the broad discretion given to all district attorneys statewide to seek the death penalty, the basis for deciding to seek the death penalty differs from district attorney's office to district attorney's office.[79] In some offices, as long as the defendant's crime falls within section 17-10-30 of the O.C.G.A., the prosecuting attorney is authorized to seek the death penalty,[80] while in other offices a number of factors are taken into consideration, including (1) strength of the evidence, (2) magnitude of the crime, (3) defendant's mental disabilities, (4) defendant's criminal record and background, (5) defendant's family history and background, (6) public sentiment, (7) family concerns, and (8) the role, if any, of domestic violence.[81]

Based on the number and scope of aggravating factors contained in the O.C.G.A., combined with the varying factors upon which district attorney's offices base their decision to seek the death penalty and the results of the race study appended to this report (finding that race matters in Georgia death penalty sentencing),[82] the Georgia Death Penalty Assessment Team makes the following recommendations:

1. The State of Georgia should sponsor a study of its death penalty system to determine the existence or non-existence of unacceptable disparities, racial, geographic, or otherwise.
2. In order to make the concept of proportionality meaningful and to address the racial disparities indicated by the available data, the State of Georgia should establish a statewide clearinghouse to review decisions to seek the death penalty. This clearinghouse should also collect data on all death-

---

[77] Moore v. State, 243 S.E.2d 1, 6 (Ga. 1978) (referencing O.C.G.A. § 17-10-30 (2005)); *see also* GA. UNIFIED APPEAL R. II(C)(1); Rower v. State, 443 S.E.2d 839, 841 (Ga. 1994) (citing Jones v. State, 440 S.E.2d 161 (Ga. 1994), and stating that "[a]bsent a showing that the district attorney acted in an unconstitutional manner with respect to his case, Rower may not inquire into the prosecutor's exercise of discretion in seeking the death penalty against him").

[78] Section 17-10-30(b)(7) of the O.C.G.A. allows prosecutors to seek death when "[t]he offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." O.C.G.A. § 17-10-30(b)(7) (2005).

[79] Interview with Tom Clegg, Clegg and Daniels LLC (July 25, 2005); Interview with Kenneth D. Driggs, Assistant Public Defender, Stone Mountain Judicial Circuit Public Defender's Office (June 15, 2005); Interview with Graham A. Thorpe, Macon Judicial Circuit District Attorney's Office (Sept. 27, 2005).

[80] Interview with Tom Clegg, Clegg and Daniels LLC (July 25, 2005).

[81] Interview with Graham A. Thorpe, Macon Judicial Circuit District Attorney's Office (Sept. 27, 2005).

[82] The Race Study specifically found that white suspects and those who kill white victims are more likely to be sentenced to death than black suspects and those who kill black victims. *See* Raymond Paternoster, Glen Pierce, & Michael Radelet, *Race and Death Sentencing in Georgia, 1989-1998*, *in* AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT app., at S-T (2006).

eligible cases and make this data available to the Georgia Supreme Court for use in conducting its proportionality review.

3. The State of Georgia should restrict death penalty cases to those where the defendant is found guilty of malice murder, either express or implied.

While the Georgia Death Penalty Assessment Team has recommended these reforms, the American Bar Association has not adopted policies on the issues discussed in recommendations #2 and 3.

B. Recommendation #2

> **Each prosecutor's office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.**

The State of Georgia has, by court opinion and by statute, established certain trial procedures relevant to the reliability and/or admissibility of eyewitness identifications and expert testimony on eyewitness identifications. Recently, the Georgia Supreme Court held that the "admission of expert testimony regarding eyewitness identification is in the discretion of the trial court."[83] Similarly, the Georgia Supreme Court has found that the Georgia Suggested Pattern Jury Instruction providing juries with factors to consider when determining the reliability of an eyewitness' identification[84] "should be

---

[83] Johnson v. State, 526 S.E.2d 549, 552 (Ga. 2000). Georgia case law previously provided that "[t]he determination of a witness' credibility, including the accuracy of eyewitness identification, [was] within the exclusive province of the jury." Norris v. State, 376 S.E.2d 653, 654 (Ga. 1989). Thus, Georgia law, previous to *Johnson*, stated that expert testimony regarding the credibility and accuracy of eyewitness identification is generally inadmissible, except when it concerns organic or mental disorders or some impairment of the mental or physical faculties of the eyewitness. *See* Jones v. State, 208 S.E.2d 850, 853 (Ga. 1974). Expert testimony regarding eyewitness credibility would, therefore, generally have been excluded because the subject matter is normally within the scope of the ordinary layman's knowledge, which left cross examination as the primary medium to attack the eyewitness's credibility. *Id.*; *cf.* Loomis v. State, 51 S.E.2d 33 (Ga. 1948); Goodwyn v. Goodwyn, 20 Ga. 600 (Ga. 1856).

[84] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 206.00(1) (3d ed. 2003). The text of the instruction is as follows:

> Identity is a question of fact for determination by the jury. It is dependent upon the credibility of the witness or witnesses offered for this purpose, and you have the right to consider all of the factors previously charged you regarding credibility of witnesses.
>
> Some, but not all, of the factors you may consider, in assessing reliability of identification, are:
>
> a. The opportunity of the witness to view the alleged perpetrator at the time of the alleged incident;
> b. The witness's degree of attention toward the alleged perpetrator at the time of the alleged incident;
> c. The level of certainty shown by the witness about his/her identification;

given when testimony warrants,"[85] such as when there has been an identification prior to trial and identity of the perpetrator is a central issue in the jury trial.[86]

Additionally, the State of Georgia has established trial procedures on the sufficiency of uncorroborated witness testimony and confessions. The testimony of a single witness is not sufficient to establish a fact in cases involving "prosecutions for treason, prosecutions for perjury, and felony cases where the only witness is an accomplice . . . . Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason."[87] Similarly, "[a] confession alone, uncorroborated by any other evidence, shall not justify a conviction."[88]

Because, however, the State of Georgia does not require district attorney's offices to establish procedures and polices for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit, the State of Georgia is not in compliance with Recommendation #2. We note that we were unable to ascertain whether each district attorney's office has established procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

C. Recommendation #3

> **Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.**

Georgia law requires prosecutors to comply with a number of specific discovery requirements. In cases in which the defendant opts to participate in "reciprocal discovery," prosecutors are required, no later than ten days prior to trial or as otherwise ordered by the court, to disclose, furnish and/or permit the defendant to inspect, copy, or photograph certain types of evidence that are within the possession, custody, or control of the state or prosecution, including but not limited to statements made by the defendant;

---

d. The possibility of mistaken identity;
e. Whether the witness's identification may have been influenced by factors other than the view that the witness claimed to have; [and]
f. Whether the witness, on any prior occasion, did not identify the defendant in this case as the alleged perpetrator.

Id.

[85] Brodes v. State, 614 S.E.2d 766, 769 n.6 (Ga. 2005).
[86] *Id.* (citing to Robinson v. State, 754 A.2d 1153 (N.J. 2000)).
[87] O.C.G.A. § 24-4-8 (2005).
[88] O.C.G.A. § 24-3-53 (2005).

books, papers, documents, photographs, and tangible objects; and a report of any physical or mental examinations.[89]

On the other hand, in cases in which the defendant does not elect to participate in "reciprocal discovery," the defendant is entitled only to the discovery afforded "by the Georgia and United States Constitutions, statutory exceptions to the Act, and non-conflicting rules of court."[90] This includes but is not limited to a list of witnesses from the grand jury, *Brady* material, pre-trial examination of known handwriting samples, and records under the Open Records Act.[91] It does not, however, include discovery of the state's scientific reports, scientific work product, or trial witness lists.[92]

Regardless of whether the defendant opts to participate in reciprocal discovery, the Georgia Rules of Professional Conduct require all prosecutors to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense.[93]

Based on this information, in cases in which the defendant opts to participate in reciprocal discovery, the State of Georgia appears to provide the necessary framework to allow prosecutors to fully and timely disclose information, documents, and tangible objects to the defense and permits reasonable inspection, copying, testing, and photographing of such disclosed documents or tangible objects. However, in cases in which the defendant does not opt to participate in reciprocal discovery, it appears that the evidence afforded to the defendant is extremely limited.

Additionally, despite the framework provided by the reciprocal discovery provisions, state and federal law, and the Georgia Rules of Professional Conduct, it appears that some prosecutors still occasionally fail to comply with the discovery requirements. For example, prosecutors have failed to provide the defendant with information about promises, deals, or agreements made with state witnesses;[94] Georgia parole records;[95] and crime laboratory reports.[96]

---

[89] O.C.G.A. §§ 17-16-1 to -10 (2005).

[90] *See* State v. Lucious, 518 S.E.2d 677, 679 (Ga. 1999).

[91] Blevins v. State, 606 S.E.2d 624, 628 (Ga. Ct. App. 2004); *Lucious*, 518 S.E.2d at 684-85 (Fletcher, J., concurring in part and dissenting in part).

[92] *Lucious*, 518 S.E.2d at 681-82.

[93] GA. RULES OF PROF'L CONDUCT R. 3.8, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_38_special_responsibilities_of_a_prosecutor/ (last visited on Jan. 5, 2006).

[94] Schofield v. Palmer, 621 S.E.2d 726, 730 (Ga. 2005); Dinning v. State, 470 S.E.2d 431, 434-35 (Ga. 1996).

[95] Head v. Stripling, 590 S.E.2d 122, 126-28 (Ga. 2003).

[96] Nelson v. Zant, 405 S.E.2d 250, 252 (Ga. 1991) (dealing with FBI crime laboratory reports); Harridge v. State, 534 S.E.2d 113, 115-117 (Ga. Ct. App. 2000) (dealing with Georgia Bureau of Investigation crime laboratory reports).

Although many prosecutors fully and timely comply with all legal, professional, and ethical obligations to disclose evidence, this is not always the case. We, therefore, conclude that the State of Georgia is only in partial compliance with Recommendation #3.

D. Recommendation #4

> **Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.**

The State of Georgia has entrusted the State Bar of Georgia with investigating grievances and disciplining members of the State Bar.[97] These powers are vested in the State Disciplinary Board,[98] which is composed of the Investigative Panel and the Review Panel, and a Consumer Assistance Program.[99] The Investigative Panel has the authority to initiate grievances on its own, but also is required to receive and evaluate grievances against State Bar members.[100] All attorneys, including prosecutors, are also required to report any violation of the Georgia Rules of Professional Conduct that "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[101] All grievances other than those initiated by the Georgia Supreme Court, the Investigative Panel, or inquiries that may be filed with the Consumer Assistance Program must be first filed with the Office of the General Counsel of the State Bar, which has the authority to screen grievances to determine whether they are "unjustified, frivolous, patently unfounded or fail[] to state facts sufficient to invoke disciplinary jurisdiction of the State Bar of Georgia."[102]

---

[97] *See* GA. RULES OF PROF'L CONDUCT R. 4-201, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/4-201_state_disciplinary_board/ (last visited on Dec. 30, 2005).

[98] *See id.*

[99] *Id.*

[100] GA. RULES OF PROF'L CONDUCT R. 4-202, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_4-202_receipt_of_grievances_initial_review_by_bar_counsel/ (last visited on Dec. 30, 2005).

[101] GA. RULES OF PROF'L CONDUCT R. 8.3, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_83_reporting_professional_misconduct/ (last visited on Jan. 5, 2006).

[102] GA. RULES OF PROF'L CONDUCT R. 4-202, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_4-202_receipt_of_grievances_initial_review_by_bar_counsel/ (last visited on Dec. 30, 2005).

Since 1986, only one prosecutor has been disbarred and another has been suspended, and no grievances alleging a violation of the Georgia Rules of Professional Conduct by a prosecutor for actions taken in his/her official capacity have been referred to the State Bar's Investigative Panel.[103] The latter figure, however, does not include grievances that were screened out by the State Bar's Office of the General Counsel[104] as "unjustified, frivolous, patently unfounded or fail[ing] to state facts sufficient to invoke the disciplinary jurisdiction of the State Bar of Georgia."[105]

The lack of disciplinary action taken by the State Bar of Georgia notwithstanding, the Center for Public Integrity's study of Georgia criminal appeals, including both death and non-death cases, from 1970 to the present revealed 449 Georgia cases in which the defendant alleged prosecutorial error or misconduct.[106] "In 39 [of the 449 cases], judges ruled [that the] prosecutor's conduct prejudiced the defendant" and remedied the misconduct by reversing or remanding the conviction, sentence, or indictment.[107] "Of the cases in which judges ruled a prosecutor's conduct prejudiced the defendant, [twenty-four] involved improper trial behavior, six involved discrimination in jury selection, six involved withholding evidence from the defense, one involved goading the defendant into a mistrial, one involved pre-trial tactics and one involved knowingly using false testimony."[108]

In the majority of the cases in which the defendant alleged prosecutorial misconduct (337 out of the 449), however, the prosecutor's conduct or error was found to be harmless.[109] Errors which Georgia courts have found to be harmless based on the facts of the case include but are not limited to: (1) prosecutor's reference to future dangerousness during closing arguments in the guilt/innocence phase;[110] (2) prosecutor's reference to defendant's pre-trial silence;[111] (3) prosecutor's reference to defendant's failure to testify

---

[103] Email from Chuck Olson, General Counsel, Prosecuting Attorneys' Council, to Anne Emanuel, Associate Dean for Academic Affairs and Professor of Law, Georgia State University College of Law (Oct. 11, 2005) (on file with author); *see also* STATE BAR OF GA., RULES OF CONDUCT & PROCEDURE OF THE INVESTIGATIVE PANEL STATE DISCIPLINARY BOARD, *at* http://www.gabar.org/handbook/internal_rules_-_investigative_panel/ (last visited on Jan. 5, 2006).

[104] According to the State Bar of Georgia's website, "[t]he State Bar of Georgia's Office of the General Counsel serves as the Court's arm to investigate and prosecute claims that a lawyer has violated the ethics rules." *See* State Bar of Georgia, Ethics, *at* http://www.gabar.org/ethics/ (last visited on Jan. 5, 2006).

[105] Email from Chuck Olson, General Counsel, Prosecuting Attorneys' Council, to Anne Emanuel, Associate Dean for Academic Affairs and Professor of Law, Georgia State University College of Law (Oct. 11, 2005) (on file with author).

[106] Center for Public Integrity, In Your State: Georgia, *at* http://www.publicintegrity.org/pm/states.aspx?st=GA (last visited on Jan. 5, 2006).

[107] *Id.*

[108] *Id.*

[109] Center for Public Integrity, Nationwide Numbers, *at* http://www.publicintegrity.org/pm/search.aspx?act=nat&hID=y (last visited on Jan. 5, 2006).

[110] McClain v. State, 477 S.E.2d 814, 821-822 (Ga. 1996); *see also* Wyatt v. State, 485 S.E.2d 470, 474-75 (Ga. 1997); Cherry v. State, 496 S.E.2d 764, 768 (Ga. Ct. App. 1998).

[111] Henry v. State, 604 S.E.2d 469, 472 (Ga. 2004).

at trial;[112] (4) prosecutor's failure to disclose audiotape conversations of an agreement made between a police officer and a witness.[113]

Although the State of Georgia, through the State Bar, has established a procedure by which grievances are investigated and members of the State Bar are disciplined, the procedure's effectiveness is questionable given the non-existent number of grievances made or initiated against prosecutors combined with the small number of cases in which judges have found that the prosecutor's conduct prejudiced the defendant. Based on this information, the State of Georgia is only in partial compliance with Recommendation #4.

E. Recommendation #5

> **Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.**

The Georgia Supreme Court, relying on precedent from the United States Supreme Court, has found that a prosecutor is required to disclose evidence of which s/he is aware as well as "favorable evidence known to others acting on the government's behalf," even if the prosecutor is not personally aware of its existence.[114] Given that a prosecutor is responsible for disclosing favorable evidence that s/he is not personally aware of but is known to others acting on the government's behalf (i.e., law enforcement officers), it is in the best interest of all prosecutors to ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigation evidence. We are, however, aware of one instance in which the relevant police agency failed to disclose material evidence to the prosecutor.[115] This information is insufficient to draw any conclusions as to whether all prosecutors are meeting or failing to meet Recommendation # 5.

F. Recommendation #6

> **The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.**

The State of Georgia has established the Prosecuting Attorneys' Council (PAC) to "assist the prosecuting attorneys throughout the state in their efforts against criminal activity in

---

[112] Raheem v. State, 560 S.E.2d 680, 685 (Ga. 2002).
[113] Owen v. State, 453 S.E.2d 728, 730-31 (Ga. 1995).
[114] Kyles v. Whitley, 514 U.S. 419, 437-39 (1995); Schofield v. Palmer, 621 S.E.2d 726, 730-31 (Ga. 2005).
[115] *See, e.g.*, *Palmer*, 621 S.E.2d at 726.

the state."[116] PAC "offers general and specialized Georgia State Bar CLE-accredited training courses for the professional development needs of Georgia prosecutors as they progress through their careers as public attorneys."[117] Two out of every three years, PAC offers a course on capital litigation (i.e., 2005 Winter Conference).[118] PAC also provides training to investigators and key personnel to equip them with "specific job-related skills that are essential for competency and proficiency."[119] Based on this information, the State of Georgia is in compliance with Recommendation #6.

---

[116] O.C.G.A. § 15-18-40(b) (2005); Prosecuting Attorneys' Council, Council Members, *at* http://www.pacga.org/about/council.shtml (last visited on Jan. 5, 2005) (including the names, titles, and e-mail addresses for all nine council members).

[117] Prosecuting Attorneys' Council, Training, *at* http://www.pacga.org/departments/training.shtml (last visited on Dec. 27, 2005).

[118] E-mail Interview with Richard Malone, Executive Director, Prosecuting Attorneys' Council, and Joe Burford, Director of Trial Support, Prosecuting Attorneys' Council (April 14, 2005); *see, e.g.*, Prosecuting Attorneys' Council, 2005 Winter Conference and 2005 Introduction to Drug Prosecution Course, After-Report and Photo Gallery, *at* http://www.pacga.org/training/2005_wc_photo_gallery.htm (last visited on Jan. 5, 2006).

[119] Prosecuting Attorneys' Council, Training, *at* http://www.pacga.org/departments/training.shtml (last visited on Jan. 5, 2006); *see also* O.C.G.A. § 15-18-45(a) (2005) (stating that PAC is "authorized to conduct or approve for credit or reimbursement, or both, basic and continuing legal education courses or other appropriate training programs for the district attorneys, solicitors-general, and other prosecuting attorneys of this state and the members of the staffs of such officials"); Prosecuting Attorneys' Council, 2005 Winter Conference and 2005 Introduction to Drug Prosecution Course, After-Report and Photo Gallery, *at* http://www.pacga.org/training/2005_wc_photo_gallery.htm (last visited on Jan. 5, 2006) (stating that "[t]he second day of the conference was devoted to specialized tracks for District Attorneys, Solicitors and Investigators. . . . members of the Lookout Mountain and Clayton Judicial Circuits discussed Interviewing a Witness for Trial on the investigator's track. Investigators were also treated to Jerry Scott of the GBI who debunked many of the common myths about crime scene investigation.").

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE

Defense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study shows definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants..

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for the defense counsel's errors, the result of the proceeding would have been different.[1] The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.[2] In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that led ultimately to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. The lives of these defendants often rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, *pro bono* representation in capital cases, most *pro bono* representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring

---

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), *available at* http://ccjr.policy.net/cjedfund/jpreport/finrep.PDF (last visited on Jan. 6, 2006).

adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

I. FACTUAL DISCUSSION

Georgia's system for providing legal representation to indigent defendants was recently overhauled with the adoption of the "Georgia Indigent Defense Act of 2003" (Indigent Defense Act),[3] which largely became effective on January 1, 2005.[4] The adoption of the Indigent Defense Act followed the release of the Report of the Chief Justice's Commission on Indigent Defense (Commission), which was established by the Georgia Supreme Court to "study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation."[5] The Commission studied the status of indigent defense in Georgia by conducting seventeen public sessions at which it heard suggestions on improvements to the indigent defense system, by visiting two of Georgia's judicial districts to observe court proceedings, and by commissioning the Spangenberg Group[6] to conduct a study concerning the operation of indigent defense in Georgia.[7]

The Spangenberg Group's study focused on nineteen of Georgia's 159 counties, which were selected to be representative of Georgia's ten judicial districts, geography and population, and to reflect a diversity of delivery systems.[8] The study resulted in over

---

[3] The Indigent Defense Act was adopted on May 22, 2003 and codified at sections 17-12-1 through 17-12-128 of the O.C.G.A. *See* 2003 Ga. Laws 32 (H.B. 770). Prior to the adoption of the Indigent Defense Act, the Georgia Indigent Defense Council (GIDC) was responsible for the administration of state and local funds to support local programs, such as a local tripartite governing committee, which was responsible for establishing and managing a state-funded local indigent defense program for a county or a set of counties. *See* REPORT OF THE GEORGIA SUPREME COURT CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE 32-34 (2002) [hereinafter COMMISSION REPORT], *available at* http://www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc (last visited on Oct. 26, 2005). Each of Georgia's 159 counties (or the local tripartite governing committee within the county) adopted one or more of the three methods of delivering legal services to indigent criminal defendants: (1) panel system; (2) contract system; and (3) public defender system. *Id.* at 35. For example, "[r]epresentation of capital defendants in DeKalb and Houston counties [was] provided by the public defender office and panel attorneys. In Fulton County, the Conflict Defender takes up to two death penalty cases a year, and panel attorneys handle[d] the balance." *See* STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, pt. 1, at 58 (2002) [hereinafter SPANGENBERG REPORT], *available at* http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc (last visited on Oct. 26, 2005); *see also* SOUTHERN CENTER FOR HUMAN RIGHTS, "IF YOU CANNOT AFFORD A LAWYER . . .": A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM (2003), *available at* http://www.schr.org/reports/docs/jan.%202003.%20report.pdf (last visited Oct. 26, 2005); SOUTHERN CENTER FOR HUMAN RIGHTS, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES (2000), *available at* http://www.schr.org/reports/docs/IndigentRpt.pdf (last visited on Oct. 26, 2005).

[4] *See* O.C.G.A. 17-12-13 (2005) (stating that portions of the Act pertaining to the Georgia Public Defender Standards Council "shall become effective on December 31, 2003," except section 17-12-3, which became effective on July 1, 2003, for the purpose of making the initial appointments to the council).

[5] COMMISSION REPORT, *supra* note 3.

[6] The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs. *See* Spangenberg Group, *at* http://www.spangenberggroup.com/index.html (last visited on Oct. 26, 2005).

[7] COMMISSION REPORT, *supra* note 3.

[8] SPANGENBERG REPORT, *supra* note 3, at 3.

thirty "black letter findings" on the state of Georgia's indigent legal representation system.[9]

Based on the Spangenberg study and the Commission's own research, the Commission found that "the right to counsel guaranteed by the state and federal constitutions is not being provided for all of Georgia's citizens."[10] The Commission attributed this failure to two main factors:

1. The State of Georgia is not providing adequate funding to fulfill the constitutional mandate that all citizens have effective assistance of counsel available when charged with a crime;[11] and
2. The State of Georgia lacks a statewide system of accountability and oversight to provide constitutionally adequate assistance of counsel for indigent defendants.[12]

The Indigent Defense Act attempts to address these factors by providing for a state-funded indigent legal representation system that is comprised of public defender offices

---

[9] *Id.* at 91-104. The "black letter findings," included, but were not limited to the following:

1. A lack of program oversight and insufficient funding are the two chief problems underlying a complete absence of uniformity in the administration of and quality of indigent defense services throughout the 19 Georgia counties we studied.
2. In most of Georgia's local indigent defense programs, there are few mechanisms in place to guarantee that defense lawyers are consistently held accountable for the quality of representation they provide to indigent defendants.
3. There is no effective statewide advocate for indigent defense in Georgia.
4. Major problems were found surrounding requests for investigators or expert witnesses.
5. Georgia lacks a systematic approach to identifying and assisting indigent defendants who suffer from mental illness.
6. There is an imbalance of resources between prosecution and indigent defense in Georgia.
7. In most of the counties we visited, there are no minimum eligibility criteria for attorneys who wish to accept court-appointed cases.
8. In the majority of counties we visited, there are no requirements that attorneys taking court-appointed cases participate in continuing legal education programs in criminal law.
9. Georgia is the only state in the country that does not provide a right to counsel in capital post-conviction (habeas corpus) cases.
10. There is a lack of reliable and comprehensive statewide data on indigent defense in Georgia.

Id.

[10] COMMISSION REPORT, *supra* note 3, at 3.

[11] *Id.* (referencing the Spangenberg Report which found that "none of the 19 counties [it studied] provided sufficient funds to assure quality representation to all indigent defendants").

[12] *Id.* (noting that the Spangenberg Report found that "the GIDC, despite what might be seen as its statutory mandate, has not been an effective statewide advocate for the cause of indigent defense in the State and has not been able to monitor compliance with the Supreme Court's Guidelines on indigent defense"); *see also* "IF YOU CANNOT AFFORD A LAWYER . . .", *supra* note 3, at 51 (stating "[i]n many counties the tripartite committee exists only on paper and uncompensated tripartite committee members do not have the time, inclination, or expertise to monitor the quality of representation provided by contract defenders, court-appointed lawyers, and public defenders").

in each of the state's judicial circuits,[13] the Office of Mental Health Advocacy,[14] and the Office of the Georgia Capital Defender.[15] This system is overseen by the Georgia Public Defender Standards Council.[16] These changes to Georgia's indigent legal representation system, however, only apply to indigent defendants tried after the Indigent Defense Act's effective date of January 1, 2005. Therefore, defendants sentenced to death before January 1, 2005 did not have the benefit of this new indigent system.

A. Georgia's Indigent Legal Representation System

1. The Georgia Public Defender Standards Council

The Georgia Public Defender Standards Council (GPDSC), created on December 31, 2003 by the Indigent Defense Act,[17] is an independent agency within the judicial branch[18] charged with "assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation."[19]

a. The Composition of the Georgia Public Defender Standards Council and the Georgia Public Defender Standards Council's Director

The GPDSC is composed of eleven members;[20] one of the members must be a circuit court public defender[21] and the remaining must represent each of the ten judicial districts in the state.[22] All GPDSC member positions, except the circuit court public defender position, are filled by appointment for a term of four years.[23] The circuit court public defender position must be filled by a majority vote of all circuit court public defenders

---

[13] O.C.G.A. § 17-12-20 (2005).

[14] O.C.G.A. § 17-12-81 (2005). The Office of the Mental Health Advocate (OMHA) monitors cases in Georgia involving pleas of "not guilty by reason of insanity," and it has the right to assume the defense and representation of any indigent defendant found to be "not guilty by reason of insanity" if the resources, funding, and staffing of the office allow. *See* O.C.G.A. § 17-12-87 (2005). However, the attorney who represented the defendant at trial has the option to retain responsibility of the case. *Id.*

[15] O.C.G.A. § 17-12-121 (2005).

[16] O.C.G.A. §§ 17-12-1 through 17-12-13 (2005).

[17] O.C.G.A. § 17-12-11 (2005) (noting that on "December 31, 2003, the Georgia Public Defender Standards Council shall assume all powers, duties, and obligations of the Georgia Indigent Defense Council").

[18] O.C.G.A. § 17-12-1(b) (2005).

[19] O.C.G.A. § 17-12-1(c) (2005).

[20] O.C.G.A. § 17-12-3 (a) (2005). All of the GPDSC members were initially appointed to the GPDSC on July 1, 2003. *See* O.C.G.A. § 17-12-3(b)(4) (2005).

[21] O.C.G.A. § 17-12-3(b)(3)-(4) (2005) (noting that the initial circuit court public defender position on the GPDSC will be filled by appointment by the Georgia Supreme Court).

[22] O.C.G.A. § 17-12-3(b)(2) (2005).

[23] O.C.G.A. § 17-12-3(b)(1) (2005) (indicating that each individual may appoint two Council members); O.C.G.A. § 17-12-3(b)(2) (2005) (including the rotation schedule for the appointment of Council members).

for a term of two years.[24] All GPDSC members are required to "be individuals with significant experience working in the criminal justice system or who have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants."[25] The GPDSC is responsible for appointing a director with similar qualifications who will serve at the pleasure of the GPDSC.[26]

b. Duties of the Georgia Public Defender Standards Council

In an effort to assure that "adequate and effective legal representation" is provided to entitled indigent persons, the GPDSC is responsible for the following:

1. Assisting public defenders throughout the state;[27]
2. Approving and implementing programs, services, rules, policies, procedures, regulations, and standards pertaining to indigent representation, including standards for qualifications and performance of counsel representing indigent persons in capital cases;[28] and
3. Conducting or approving for credit or reimbursement, or both, basic and continuing legal education courses for circuit court public defenders and the staff.[29]

The GPDSC is required to approve and implement the following standards:

1. Standards for maintaining and operating circuit defender offices, including requirements regarding qualifications, training, and size of the legal and supporting staff of such offices;
2. Standards prescribing minimum experience, training, and other qualifications for appointed counsel where a conflict of interest arises between the public defender and an indigent person;
3. Standards for assistant public defender and appointed counsel caseloads;

---

[24] O.C.G.A. § 17-12-3(b)(3) (2005).
[25] O.C.G.A. § 17-12-3(b)(1) (2005).
[26] *See* O.C.G.A. § 17-12-5(a) (2005).
[27] O.C.G.A. § 17-12-6(a) (2005). The GPDSC may assist public defenders throughout the state by:

1. Preparing and distributing basic defense manuals and other educational materials;
2. Preparing and distributing model forms and documents employed in indigent defense;
3. Promoting and assisting in the training of indigent defense attorneys;
4. Providing legal research assistance to public defenders; and
5. Providing any other assistance to public defenders as may be authorized by the law.

Id.
[28] O.C.G.A. § 17-12-8(b) (2005); *see also* GA. PUB. DEFENDER STANDARDS COUNCIL, BYLAWS, art. 2, § 2.3(a) [GPDSC BYLAWS], *available at* http://www.gpdsc.com/aboutus-council-bylaws_updated.pdf (last visited on Oct. 26, 2005) (including procedures applicable to any standards adopted by the GPDSC).
[29] O.C.G.A. § 17-12-9 (2005).

4. Standards for the performance of assistance public defenders and appointed counsel representing indigent persons;
5. Standards and procedures for the appointment of independent, competent, and efficient counsel for representation in both the trial and appellate courts of indigent persons whose cases present a conflict of interest;
6. Standards for providing and compensating experts, investigators, and other persons who provide services necessary for the effective representation of indigent persons;
7. Standards for qualifications and performance of counsel representing indigent persons in capital cases;
8. Standards for determining indigence and for assessing and collecting the costs of legal representation and related services;
9. Standards for compensation of attorneys appointed to represent indigent persons;
10. Standards for removing a circuit public defender for cause pursuant to section 17-12-20 of the O.C.G.A.;
11. Standards for a uniform definition of a "case" for purposes of determining caseload statistics; and
12. Standards for accepting contractual indigent defense representation.[30]

All standards promulgated by the GPDSC must be publicly available for review,[31] posted on the GPDSC's website,[32] and reviewed by the General Oversight Committee for the GPDSC,[33] which is composed of eight members of the General Assembly.[34] All standards determined by the General Oversight Committee to have a "fiscal impact" will become effective only when ratified by joint resolution of the General Assembly and upon approval of the resolution by the Governor or upon its becoming law without his/her approval.[35] All standards must identify the date upon which the standard took effect and, if the standard is subject to ratification by the General Assembly, the status of the standard with respect to ratification.[36]

2. Circuit Public Defenders

---

[30] *See* O.C.G.A. § 17-12-8(b)(1)-(12) (2005).
[31] *See* O.C.G.A. § 17-12-8(d) (2005); *see also* GPDSC BYLAWS, *supra* note 28, at art. 2, § 2.3(a) (discussing in detail the notice and comment period for GPDSC standards).
[32] *See* O.C.G.A. § 17-12-8(d) (2005).
[33] O.C.G.A. § 17-12-8(c) (2005).
[34] O.C.G.A § 17-12-10.1(a) (2005). The General Oversight Committee for the GPDSC is composed of three members of the House of Representatives appointed by the Speaker of the House of Representatives, three members of the Senate appointed by the Senate Committee on Assignments or such person or entity as established by Senate rule, and one member of the House of Representatives and one member of the Senate appointed by Governor. *Id.* The Committee is charged with making annual reports of "its activities and findings" to the General Assembly and the Governor. *See* O.C.G.A. § 17-12-10.1(f) (2005).
[35] O.C.G.A. § 17-12-8(c) (2005).
[36] O.C.G.A. § 17-12-8(d) (2005).

The State of Georgia is divided into forty-nine judicial circuits.[37] Within each judicial circuit, there exists a "Circuit Public Defender Selection Panel"[38] responsible for appointing the circuit's public defender.[39] To date, the selection panels in forty-four of the forty-nine judicial circuits have appointed circuit public defenders.[40] Four of the forty-nine judicial circuits,[41] however, have obtained approval by the GPDSC to "opt-out" of the state indigent legal representation system, meaning that these counties continue to provide an alternative delivery system to the state system.[42]

In all judicial circuits, apart from those that have opted out of the statewide system, the circuit public defender is charged with overseeing the circuit public defender office within his/her circuit. Each circuit public defender office is charged with providing representation to indigent persons in the following actions and proceedings:

1. Any case prosecuted in a superior court under the laws of the State of Georgia in which there is a possibility that a sentence of imprisonment or probation or a suspended sentence of imprisonment may be adjudged;
2. A hearing on a revocation of probation in a superior court;
3. Any juvenile court case where the juvenile may face a disposition of confinement, commitment, or probation; and
4. Any direct appeal of any of the proceedings enumerated in 1 through 3.[43]

Neither the circuit public defenders offices nor the alternative delivery systems may provide representation to indigent persons charged with a capital felony for which the death penalty is being sought.[44] These cases are handled by the Office of the Georgia Capital Defender.

---

[37] Judicial Branch of Georgia, Administrative Office of the Courts, *at* http://www.georgiacourts.org/courts/ (last visited on Oct. 26, 2005).

[38] Each Circuit Public Defender Selection Panel is composed of five members. *See* O.C.G.A. § 17-12-20(a) (2005). The Governor, Lieutenant Governor, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court of Georgia, and the Chief Judge of the superior court of the circuit are each responsible for appointing one member to each Circuit Public Defender Selection Panel. *Id.* Appointed members must be individuals with significant experience in the criminal justice system and must reside in the judicial circuit in which they serve. *Id.*

[39] O.C.G.A. § 17-12-20(b) (2005). To be eligible to be a circuit public defender, a person must: (1) Have attained the age of 25; (2) Have been duly admitted and licensed to practice law in the superior courts for at least three years; (3) Be a member in good standing of the State Bar of Georgia; and (4) If previously disbarred, have been reinstated as provided by law. *See* O.C.G.A. § 17-12-21 (2005).

[40] Georgia Public Defender Standards Council, Office Locations, *at* http://www.gidc.com/cpdsystem-office_locations.htm (last visited on Oct. 26, 2005).

[41] The four judicial circuits are: Cobb, Douglas, Gwinnett, and Houston. *See id*.

[42] *See id*.

[43] O.C.G.A. § 17-12-23(a) (2005); *see also* O.C.G.A. § 17-12-23(b) (2005) (stating that entitlement to the services of counsel "begins as soon as is feasible and no more than 72 hours after the indigent person is taken into custody or service is made upon him or her of the charge, petition, notice, or other initiating process").

[44] *See* O.C.G.A. § 17-12-121 (2005) (noting that "[t]he office shall serve all counties of this state").

3. The Office of the Georgia Capital Defender

The Office of the Georgia Capital Defender (GCD), established in January 1, 2005,[45] is responsible for "undertak[ing] the defense of all indigent persons charged with a capital felony for which the death penalty is being sought in any court in this state," except in cases of a conflict of interest.[46]

The GCD is overseen by the Capital Defender, who is appointed by and "shall serve at the pleasure" of the GPDSC.[47] The GPDSC is also responsible for the overall management of the office including but not limited to: (1) establishing the salaries of the capital defender and the office staff; (2) approving the level of staffing of the office; (3) establishing the office policies; and (4) preparing the office's annual budget, administering the funds made available to the office, and overseeing the expenditure of the funds.[48] The Capital Defender is, however, responsible for hiring, with the advice and consent of the GPDSC, as many assistant attorneys, clerks, investigators, paraprofessionals, administrative assistants, and other personnel as may be necessary.[49]

a. Georgia Capital Defender Budget for GCD and Conflict Attorneys

Based on a projection of forty death penalty cases per year, the GCD budget includes salaries for ten attorneys to handle these cases.[50] The budget also includes funds to handle an additional nine conflict cases for a total of forty-nine cases per year.[51] For the conflict cases, the GCD has set aside in the GCD budget approximately $360,000 per case--

---

[45] Prior to the establishment of the GCD, the Multi-County Public Defender Office (MCPD) provided assistance in death penalty cases. *See* Interview with Chris Adams, Georgia Capital Defender (May 20, 2005). At that time, the presiding judge in a capital case had the option to contact the MCPD to inquire into whether it would provide representation, and the MCPD could accept or decline representation. *Id.* "In 2002, the Multi-County Public Defender's Office opened files in 23 new death penalty cases. It also provided consulting services in 87 cases in 35 different counties. Additionally, a total of 20 death penalty cases were resolved by either negotiated pleas or jury trials." *See* GA. INDIGENT DEFENSE COUNCIL, 2002 ANNUAL REPORT 6 (2002), *available at* http://www.gpdsc.com/cpdsystem-reports-annual_report_2002.pdf (last visited on Oct. 26, 2005). Similarly, in 2001, the MCPD provided direct representation or consultative services in eighty-four cases in thirty-eight different counties. *See* SPANGENBERG REPORT, *supra* note 3, at 19. At that time, the MCPD was staffed by five attorneys, including the MCPD, four mitigation specialists/investigators, one mental health specialist, one clerk, one tracking/statistics specialist, and one administrative assistant. *Id.* Through its work, the MCPD became known for raising the level of capital defense in the State of Georgia. *Id.* at 59.

[46] O.C.G.A. § 17-12-121 (2005).

[47] O.C.G.A. § 17-12-125 (2005) (stating that the capital defender must have been licensed to practice law in the State of Georgia for at least five years and must be competent to counsel and defend a person charged with a capital felony).

[48] O.C.G.A. § 17-12-123 (2005).

[49] O.C.G.A. § 17-12-126(a) (2005).

[50] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

[51] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author); Georgia Public Defender Standards Council, Meeting Minutes (Aug. 22, 2003), *at* http://www.gpdsc.com/aboutus-council-minutes-minutes_08-22-03%20.pdf (last visited on Oct. 26, 2005).

$240,000 for attorneys fees and $120,000 for experts and investigation.[52] However, as of early December 2005, forty-seven capital prosecutions—thirty-five handled by GCD and twelve handled by a conflict defender—had commenced.[53] In addition to these new cases beginning in 2005, there were also twelve capital cases already in the trial stage in which the GCD represents the defendant.[54] These projections leave the GCD potentially understaffed in its first year of operation.[55]

b. Compensation of Georgia Capital Defender Attorneys and Conflict Attorneys[56]

The GCD consulted the State Merit System of Personnel Administration for an analysis of workload in order to determine the compensation for GCD employees.[57] The approximate salary range for GCD attorneys is between $68,000 and $89,000 annually.[58]

In cases in which the GCD is unable to represent an indigent accused of a capital felony for which the death penalty is being sought, the appointed counsel must be "paid with state funds appropriated to the [GPDSC] for use by the [GCD]."[59] To obtain payment, appointed counsel must submit a certified copy of the court's order of appointment, the Death Notice, and a "Death Penalty Conflict Case Appointment Request and Application

---

[52] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

[53] *Id.*; *see also* Georgia Public Defender Standards Council Legislative Oversight Committee, Meeting Minutes (July 11, 2005), *at* http://www.gpdsc.com/aboutus-council-loc-0705.pdf (last visited Oct. 31, 2005) (noting that there could be as many as 65 death noticed cases).

[54] Interview with Chris Adams, Georgia Capital Defender (May 20, 2005).

[55] *Id.*; *see also* Georgia Public Defender Standards Council Legislative Oversight Committee, Meeting Minutes (July 11, 2005), *at* http://www.gpdsc.com/aboutus-council-loc-0705.pdf (last visited Oct. 31, 2005).

[56] Prior to the adoption of the Indigent Defense Act, a set rate for attorneys handling capital cases did not exist. Rather, "[u]nder the Indigent Defense Guidelines and the Revised Unified Appeal, compensation for panel attorneys appointed to capital cases [had to] be set at a higher rate than the rate in non-death penalty cases," but the rate varied from county to county. *See* SPANGENBERG REPORT, *supra* note 3, at 58. In Dougherty County, attorneys handling death penalty cases [were] paid $65 an hour for out-of-court work and $90 an hour for in-court work. In Cobb County, the county's fee schedule call[ed] for appointed counsel to be paid $75/hour in-court and $65/hour out-of-court with no maximum." *Id.* In Baldwin County, attorneys in death penalty cases "[were] not paid hourly rates but [were] instead paid a flat fee at the end of a case determined by the judges based on the work performed." *Id.* at 36. "In many counties [the Spangenberg Group] heard repeated complaints by panel attorneys that their vouchers are routinely reduced by the tripartite committee or the judges, often without explanation. Most counties offer some sort of mechanism to appeal a reduction in voucher payment." *Id.*; *see also* "IF YOU CANNOT AFFORD A LAWYER . . .", *supra* note 3, at 50 (stating "In Dekalb County, an experienced and highly regarded lawyer was appointed to represent an indigent defendant in a death penalty case that lasted more than two years. She conducted an intensive investigation, spent days arguing motions, took the case to trial, and put on more than 50 defense witnesses. Seven months after the conclusion of the trial and without explanation, the judge cut the lawyer's fee request by approximately one-third.").

[57] Interview with Chris Adams, Georgia Capital Defender (May 20, 2005).

[58] *Id.*

[59] O.C.G.A. § 17-12-127(b) (2005).

for Vendor Number"[60] to the GPDSC.[61] Once these documents are processed, the GPDSC will be able to process requests for payment.[62] At the end of each month, attorneys are required to submit a "Fee Claim Form"[63] summarizing the time spent on the case and an "Itemized Statement" detailing the time and activities billed in the tenths of an hour.[64] The attorneys are reimbursed at a rate of $125.00 per hour for work both in and out of court.[65]

B. *Appointment, Qualifications, Training and Resources Available to Attorneys Handling Death Penalty Cases Covered by Georgia's Indigent Legal Representation System*

1. Georgia Public Defender Standards Council's Death Penalty Defense Standards

Under the Georgia Public Defender Standards Council's (GPDSC) authority to approve and implement standards pertaining to indigent representation, the GPDSC adopted on April 6, 2005, the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Guidelines) as the "GPDSC Death Penalty Defense Standards."[66] The GPDSC adopted the Guidelines "in full except in the rare occasion where the Guidelines specifically contradict the law of Georgia. In this event, the

---

[60] Georgia Public Defender Standards Council, Death Penalty Conflict Case Appointment Request and Application for Vendor Number, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_vendor_app.doc (last visited on Oct. 27, 2005).

[61] Georgia Public Defender Standards Council, Protocol for Payment of Attorneys Fees to Counsel Appointed to Represent Clients in Death Penalty Cases After January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_atty_fees.pdf (last visited on Oct. 27, 2005).

[62] *Id.*

[63] The "Fee Claim Form" is available at Georgia Public Defender Standards Council, Death Penalty Conflict Defender Fee Claim Form, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp-fee_claim.doc (last visited on Oct. 27, 2005).

[64] Georgia Public Defender Standards Council, Protocol for Payment of Attorneys Fees to Counsel Appointed to Represent Clients in Death Penalty Cases After January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_atty_fees.pdf (last visited on Oct. 27, 2005).

[65] Georgia Public Defender Standards Council, Death Penalty Conflict Defender Fee Claim Form, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp-fee_claim.doc (last visited on Oct. 27, 2005).

[66] *See* GA. PUB. DEFENDER STANDARDS COUNCIL, FINAL PAGE OF DEATH PENALTY DEFENSE STANDARDS, *at* http://www.gidc.com/cpdsystem-standards-death_penalty_case_final_page.pdf (last visited on Oct. 27, 2005); GA. PUB. DEFENDER STANDARDS COUNCIL, DEATH PENALTY DEFENSE STANDARDS, *at* http://www.gidc.com/cpdsystem-standards-death_penalty_case.pdf (last visited on Oct. 27, 2005); *see also* Georgia Public Defender Standards Council, Meeting Minutes (April 6, 2005), *at* http://www.gpdsc.com/aboutus-council-minutes-minutes_04-06-05.pdf (last visited on Oct. 7, 2005) (noting that the GPDSC Death Penalty Standards "were already fully debated and posted for 30 days was made, seconded and approved unanimously with 7 affirmative votes"); *see also* Georgia Public Defender Standards Council, Performance Standards for Appellate Counsel, *at* http://www.gpdsc.com/cpdsystem-standards-main.htm (last visited on Nov. 21, 2005) (publishing the Performance Standards for Appellate Counsel for comment; the period for comments ends on Dec. 8, 2005, one day before the GPDSC considers the standards for adoption on Dec. 9, 2005).

Guideline[s] shall be inapplicable to Georgia."[67] The GPDSC provided the following example to illustrate an instance in which the Guidelines contradict Georgia law:

> Guideline 2.1(c) and the Commentary for Guideline 3.1 specifically require that all death penalty defense lawyers should be appointed by an independent agency free from political influence rather than by the judiciary. O.C.G.A. § 17-12-127(b) requires the presiding judge to appoint counsel in all instances where the office of the Georgia Capital Defender has a conflict of interest.[68]

Apart from this example, the GPDSC has not provided a list of the Guidelines that contradict Georgia law. Therefore, it is unclear how many other Guidelines contradict Georgia law, making them inapplicable to the state's laws and practices.

Additionally, it does not appear that the GPDSC Death Penalty Defense Standards are currently effective and enforceable as adopted by the GPDSC. We note that the Office of the Georgia Capital Defender (GCD) treats the GPDSC Death Penalty Defense Standards as binding on the GCD. However, the GPDSC Death Penalty Defense Standards do not include an effective date or indicate the status of the standards with respect to General Assembly ratification,[69] which is required if the General Oversight Committee determines that the standards have a "fiscal impact."[70] On March 23, 2005, the General Oversight Committee "determined that all of the standards adopted so far by the [GPDSC] have a fiscal impact,"[71] but this determination was made prior to the GPDSC's adoption of the GPDSC Death Penalty Defense Standards. Since that time, however, we have been told that the Legislature has deemed the GPDSC Death Penalty Defense Standards to have a "fiscal impact," thus requiring ratification in order to become effective.[72]

Given that the GPDSC Death Penalty Defense Standards are not yet effective or enforceable and the extent to which the Guidelines contradict Georgia law is unclear, the Parts below will focus on established Georgia laws, rules, standards, and procedures pertaining to the appointment, qualifications, and training of counsel who are assigned or appointed to handle cases covered by Georgia's indigent legal representation system. The extent to which Georgia has implemented the Guidelines, however, will be discussed at length in the analysis section.

---

[67] DEATH PENALTY DEFENSE STANDARDS, *supra* note 66.

[68] *Id.*

[69] O.C.G.A. 17-12-8(d) (2005).

[70] *See supra* notes 34-35 and accompanying text.

[71] *See* Georgia Public Defender Standards Council, 2005 Legislative Session Report #8, *at* http://www.gpdsc.com/resources-legislation-update_04-05-05.htm (last visited on Oct. 27, 2005).

[72] *See* Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author). *See also* Georgia Public Defender Standards Council, Meeting Minutes (Sept. 16, 2005), *at* http://www.gpdsc.com/aboutus-council-minutes-minutes_09-16-05.pdf (last visited on Nov. 10, 2005) (noting that "[t]he Oversight Committee is still determining which of the standards adopted by the Council have a fiscal impact).

2. Appointment of Counsel

Under Georgia's indigent legal representation system, an accused charged with a capital felony for which the death penalty is being sought is eligible for appointed counsel at trial and on direct appeal if s/he can establish that s/he is indigent.[73] In cases in which the accused is found to be indigent, the court in which the charges are pending must notify the GCD of the situation.[74] The GCD is required to assume the defense of the accused as long as there is not a conflict of interest.[75] If for any reason the GCD is unable to defend the accused, including in cases of conflict of interest, the presiding judge of the superior court in which the case is pending must appoint counsel to represent the accused.[76]

The accused must be appointed two attorneys[77] "as soon as is feasible and no more than 72 hours after the indigent person is taken into custody or service is made upon him or her of the charge, petition, notice, or other initiating process."[78] The GCD or the appointed counsel must represent the accused through all trial court proceedings and any appeals in the Georgia Supreme Court, which includes direct appeal.[79] The Unified Appeal Rule recommends that two attorneys handle matters on direct appeal,[80] but it does not mention whether these attorneys should be the same two attorneys appointed for trial.

Following the direct review by the Georgia Supreme Court, death-sentenced inmates do not have a right to appointed counsel in any other state court proceedings, including state

---

[73] O.C.G.A. § 17-12-127 (2005). The "Standards for Determining Indigence," adopted by the Georgia Public Defender Standards Council on November 21, 2003, and ratified on August 27, 2004, define an indigent as "a person who has been arrested or charged with a crime punishable by imprisonment who lacks sufficient income or other resources to employ a qualified lawyer to defend him or her without undue hardship on the individual or his or her dependants." *See* GA. PUB. DEFENDER STANDARDS COUNCIL, STANDARDS FOR DETERMINING INDIGENCE, *at* http://www.gidc.com/cpdsystem-standards-determining_indigence.pdf (last visited on Oct. 27, 2005). If the accused earns less than 200% of the Federal Poverty Guidelines and does not possess any other resources that could be used to employ an attorney without undue hardship, indigence is presumed and the individual is entitled to appointed counsel. *Id.* An individual who earns more than 200% but less than 300% of the Federal Poverty Guidelines is presumed to be ineligible for appointed counsel unless s/he can prove, "to the satisfaction of the Circuit Public Defender's Office" that either (1) s/he is unable to obtain qualified counsel due to the "extraordinary cost of the case, as compared to [his/her] disposable income or other reasonably available resources," or (2) "there are other reasons that make it impossible for the person to obtain qualified legal representation without undue hardship on the person or [his/her] dependants." *Id.* An individual denied appointed counsel may appeal the decision to the judge, or if no judge is assigned, to the court in which his/her case is pending. *Id.*

[74] O.C.G.A. § 17-12-127(a) (2005).

[75] *Id*.

[76] O.C.G.A. § 17-12-127(b) (2005).

[77] GA. UNIFIED APPEAL R. II(A)(1).

[78] O.C.G.A.§ 17-12-23(b) (2005); *see also* GA. UNIF. SUPER. CT. R. 33.2(A) (requiring counsel be appointed before the defendant pleads to the charges, which generally occurs at the arraignment).

[79] O.C.G.A. § 17-12-127(c) (2005).

[80] GA. UNIFIED APPEAL R. II(A)(2).

habeas corpus and clemency proceedings,[81] and GCD attorneys and conflict attorneys are explicitly prohibited from providing assistance with "any petition for a writ of habeas corpus in a federal court."[82]

3. Qualifications of GCD and Conflict Attorneys

a. GCD and Conflict Attorneys for Trial

Georgia law requires any attorney who is assigned the "primary responsibility" for representing an indigent person accused of a capital offense for which the death penalty is being sought to be "authorized to practice law in [the State of Georgia] and [be] otherwise competent to counsel and defend a person charged with a capital felony."[83] The Unified Appeal Procedure also specifies that each of these attorneys:

1. must be a member in good standing of the State Bar or admitted to practice pro hac vice, and must have at least five years criminal litigation experience as a defense attorney or a prosecuting attorney;
2. must have been lead counsel on at least one death-penalty murder trial to verdict or three capital (non-death penalty) trials to verdict, one of which must have been a murder case, or have been co-counsel on two death penalty cases;
3. must be familiar with the unified appeal procedures;
4. must be familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence;
5. must have obtained the requisite training (discussed below); and
6. must have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.[84]

Similarly, co-counsel:

1. must be a member in good standing of the State Bar with combined three years criminal trial experience either as a criminal defense attorney or prosecuting attorney;
2. must have been lead or co-counsel in at least one (non-death penalty) murder trial to verdict, or in at least two felony jury trials; and
3. must have obtained the requisite training (discussed below).[85]

---

[81] *See* O.C.G.A. § 17-12-127(c) (2005); Gibson v. Turpin, 513 S.E.2d 186 (Ga. 1999) (finding no right to appointed counsel in a state habeas corpus proceeding); *see also* Jennifer N. Ide, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1113-16 (1998); Jill Wasserman, *Has Habeas Corpus Been Suspended in Georgia?: Representing Indigent Prisoners on Gerogia's Death Row*, 17 GA. ST. U. L. REV. 605, 611 (2000).

[82] O.C.G.A. § 17-12-127(c) (2005).

[83] O.C.G.A. § 17-12-126(b) (2005).

[84] GA. UNIFIED APPEAL R. II(A)(1)(a).

The trial courts are required to enforce these qualification standards.[86] If the trial court finds that an attorney is otherwise competent but does not meet these qualification standards, the court may petition the Georgia Supreme Court for authorization to appoint the attorney by specifying the attorney's qualifications and the reasons the trial court has determined that the attorney is competent to serve as either lead or co-counsel.[87]

b. GCD and Conflict Attorneys on Direct Appeal

On direct appeal, the Unified Appeal Procedure specifies that any lead counsel handling a direct appeal for an individual sentenced to death:

1. must be a member in good standing of the State Bar or admitted to practice pro hac vice and must have at least five years criminal litigation experience as a defense attorney or a prosecuting attorney; and
2. must have been co-counsel, or have actively assisted in the direct appeal of at least one death penalty case and have been counsel of record in at least three felony appeals; and
3. must have obtained the requisite training (discussed below).[88]

Similarly, co-counsel on direct appeal:

1. must be a member in good standing of the State Bar with combined three years criminal trial experience either as a criminal defense attorney or prosecuting attorney; and
2. must have experience as counsel of record in three felony appeals either as a defense attorney or prosecuting attorney; and
3. must have obtained the requisite training (discussed below).[89]

The Georgia Supreme Court is required to enforce these qualification standards.[90]

4. Training Requirements for GCD and Conflict Attorneys and Training Sponsors

a. Training Requirements

Rule II(A) of the Unified Appeal Procedure requires that all trial counsel and appellate counsel "attend[] within twelve months previous to appointment at least ten hours of

---

[85] GA. UNIFIED APPEAL R. II(A)(1)(b).
[86] GA. UNIFIED APPEAL R. II(A)(3).
[87] *Id.*
[88] GA. UNIFIED APPEAL R. II(A)(2)(a).
[89] GA. UNIFIED APPEAL R. II(A)(2)(b).
[90] GA. UNIFIED APPEAL R. II(A)(3).

specialized training or educational programs . . . or, upon appointment agree to take ten hours of such training or educational programs and maintain annually during the pendency of the case ten hours of such training or educational programs."[91] Attorneys who are lead or co-counsel in any death penalty trial must meet this requirement by participating in training or educational programming in "death penalty defense."[92] Similarly, attorneys who are lead or co-counsel on direct appeal must meet this requirement by participating in training or educational programming relating to "post-conviction appeals and appellate procedures relating to post-conviction appeals."[93]

b. Training Sponsors

The GCD sponsors two major capital defense training seminars each year.[94] In February, an advanced capital defender seminar is offered in St. Simons Island, Georgia, and during the summer, a basic capital defender-training course is offered in Atlanta, Georgia.[95] Both seminars are by invitation only with preference given to attorneys with active Georgia death penalty cases.[96]

5. Resources Available to GCD and Conflict Attorneys

The Capital Defender is authorized to hire "as many . . . investigators, . . . and other persons as may be necessary" to carry out his/her responsibilities as the Capital Defender.[97] As of early December 2005, the GCD had on staff ten investigators and one forensic social worker.[98] The GCD also has a budget to hire any necessary experts without approaching the court for approval.[99]

---

[91] GA. UNIFIED APPEAL R. II(A)(1)(a)-(b).

[92] *Id.*

[93] GA. UNIFIED APPEAL R. II(A)(2)(a)-(b).

[94] Georgia Capital Defender, Training, *at* http://www.gacapdef.org/main.htm (last visited on Oct. 27, 2005). Prior to the adoption of the Indigent Defense Act, the Multi-County Public Defender Office held seminars to train attorneys to properly handle death penalty cases. *See* 2002 ANNUAL REPORT, *supra* note 45, at 6; MULTI-COUNTY PUBLIC DEFENDER OFFICE, 2002 YEARLY REPORT (2002) (on file with the author) (describing the office's four death penalty defense seminars presented in 2002).

[95] Georgia Capital Defender, Training, *at* http://www.gacapdef.org/main.htm (last visited on Oct. 27, 2005).

[96] *Id.*

[97] O.C.G.A. § 17-12-126(a) (2005).

[98] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

[99] Prior to the adoption of the Indigent Defense Act, a defendant in need of experts or other specialists was required to file a motion requesting expert assistance at public expense to assist him/her in preparing his/her defense and/or evidence in mitigation for the penalty phase. *See* Ake v. Oklahoma. 470 U.S. 68, 83 (1985). The hearing on the defendant's motion was required to be held ex parte. *See* Brooks v. State, 385 S.E.2d 81, 84 (Ga. 1989) (stating that the state may be present when the defendant is examined as to his/her indigency). The judge hearing the case had absolute discretion to decide whether to provide certain funds subject to the constitutional restraints articulated in *Ake v. Oklahoma*. *See* Thomason v. State, 486 S.E.2d 861, 871-72 (Ga. 1997); *Ake*, 470 U.S. at 83 (requiring expert mental health experts if certain circumstances are met). The Spangenberg Report found "major problems . . . surrounding requests for investigators or expert witnesses." *See* SPANGENBERG REPORT, *supra* note 3, at iii. For example, in

Similarly, in cases in which the GCD is unable to represent the defendant due to a conflict of interest, the appointed conflict attorney does not have to apply to the court for experts or investigators.[100] Rather, the conflict attorney must submit a form entitled "Request for Pre-Approval for an Expert Witness"[101] to the Deputy Director for Conflict Case Management at the Georgia Public Defender Standards Council.[102] The form must include the total amount that the expert or investigator is requesting to perform the service(s); it should not include an hourly fee to be computed at a later date, or a variable fee based upon some future event.[103] If the total cost is unknown, the form should include an amount that will cover the expert's anticipated initial service(s), as the attorney may submit supplemental requests for additional services.[104] Requests for fees associated with the expert testimony should be handled in a supplemental request once the need for the testimony arises.[105] The pre-approval procedure must be followed in order for the experts and investigators to obtain payment for their services.[106]

C. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Cases Not Covered by Georgia's Indigent Legal Representation System: State Habeas Corpus and Clemency

The Georgia Supreme Court, in *Gibson v. Turpin*,[107] found that death-sentenced inmates do not have a right to appointed counsel in any state court proceedings after direct review by the Georgia Supreme Court.[108] Although there is no right to appointed counsel during state habeas proceedings, the State of Georgia does provide limited state funding

---

Clayton County attorneys reported that, even in death penalty cases, to get approval for investigators was akin to pulling teeth. *Id.* at 67; *see also* "IF YOU CANNOT AFFORD A LAWYER . . .", *supra* note 3, at 45 (stating "[i]n Forsyth County, where all local lawyers are conscripted to defend poor people accused of crimes, a lawyer was asked what he would do if he needed an investigator. He replied 'Too bad.' And if he needed experts? 'Too bad.' Could he approach the judge for funds? He again replied, 'Too bad.' A contract lawyer in Floyd County, who handles 200 cases, said virtually the same thing. He receives funds only for exceptional—i.e., capital—cases.").

[100] Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_experts.pdf (last visited on Oct. 27, 2005).

[101] The Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005 refers to the "Request for Pre-Approval for an Expert Witness," but we were unable to locate a form by that name. However, the GPDSC website contains a similar form entitled "Requisition for Employment of Expert Witness," which appears as if it can be used in death penalty cases.

[102] Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_experts.pdf (last visited on Oct. 27, 2005).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] 513 S.E.2d 186 (1999).

[108] *Id.* at 188-91.

(approximately $800,000 per year) to the Georgia Appellate Practice and Educational Resource Center (Resource Center), which monitors capital litigation, represents inmates petitioning for state and federal habeas corpus, and seeks pro bono counsel to handle state and federal habeas cases.[109] The Resource Center has four attorneys on staff, including the director, and two full time and two part time investigators.[110] As of May 2005, these four attorneys were serving as co-counsel or providing substantial assistance in approximately sixty pending state habeas death penalty cases.[111] A comparable organization, however, does not exist for death-sentenced inmates seeking clemency.

Apart from the Georgia Rules of Professional Conduct requiring competence,[112] there are no additional qualification standards for attorneys who handle state habeas corpus proceedings.[113] Similarly, the O.C.G.A. and the Rules of the Georgia State Board of Pardons and Paroles (the Rules) contain just one qualification requirement for attorneys handling clemency petitions and it only pertains to attorneys who are being paid to appear or practice in any matter before the Board.[114] The O.C.G.A. and the Rules require these attorneys to be licensed and active members in good standing of the State Bar of Georgia.[115] Neither the O.C.G.A. nor the Rules require paid attorneys to possess any other qualifications or mention any requisite qualifications for non-paid attorneys. Similarly, there are no training requirements for attorneys who take on state habeas or clemency cases.

D. Appointment, Qualifications, Training, and Resources Available to Attorneys Handling Federal Habeas Corpus Petitions

Pursuant to section 848(q)(4) of Title 28 of the United States Code, a death-sentenced inmate petitioning for federal habeas corpus in one of Georgia's three federal judicial districts— Northern, Middle, and Southern—is entitled to appointed counsel and other resources if s/he "is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services."[116] In the Northern District

---

[109] Interview with a Staff Member from the Resource Center (May 2005).
[110] *Id.*
[111] *Id.*
[112] GA. RULES PROF'L. CONDUCT R. 1.1, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_11_competence/ (last visited on Oct. 27, 2005) (stating that "competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").
[113] E-mail Interview with Stephanie Kearns, Executive Director, Federal Defender Program, Inc., for the Northern District of Georgia, and Susan Casey, Esq. (May 2005).
[114] O.C.G.A. § 42-9-16(a) (2004); GA. COMP. R. & REGS. 475-3-.02(3) (2004); *see also* Board of Pardons and Paroles, Other Forms of Clemency, *at* www.pap.state.ga.us/other_forms_clemency.htm (last visited on Oct. 27, 2005).
[115] O.C.G.A. § 42-9-16(a) (2004); GA. COMP. R. & REGS. 475-3-.02(3) (2004); *see also* Board of Pardons and Paroles, Other Forms of Clemency, *at* www.pap.state.ga.us/other_forms_clemency.htm (last visited on Oct. 27, 2005).
[116] 21 U.S.C. § 848(q)(4)(B) (2004); McFarland v. Scott, 512 U.S. 849, 856-57 (1994).

of Georgia, staff attorneys from the Capital Habeas Unit (CHU) of the Federal Defender Program, Inc., a federally funded, non-profit organization, are appointed to handle these cases unless there is a conflict of interest.[117] A comparable organization does not exist in either the Middle or Southern District of Georgia. Rather, death-sentenced inmates in these districts are represented by attorneys appointed by the court, who often are attorneys from the Resource Center.[118]

According to section 848(q)(4) of Title 28 of the United States Code, inmates entitled to an appointed attorney must be appointed at least one qualified attorney[119] prior to the filing of a formal, legally sufficient federal habeas petition.[120] To be qualified for appointment, the attorney must "have been admitted to practice in the [United States Court of Appeals for the Eleventh Circuit Court] for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases."[121] For "good cause," the court may appoint another attorney "whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation."[122] These attorneys must be compensated at a rate of not more than $140 per hour for in and out of court work.[123]

In addition to counsel, the court may also authorize the attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.[124] The fees and expenses paid for these services may not exceed $7,500 in any case.[125]

---

[117] E-mail Interview with Stephanie Kearns, Executive Director, Federal Defender Program, Inc., for the Northern District of Georgia, and Susan Casey, Esq. (May 2005); *see also* Plan of the United States District Court for the Northern District of Georgia Pursuant to The Criminal Justice Act of 1964, As Amended, Appendix D, *at* http://www.gand.uscourts.gov/documents/NDGARulesAppD.pdf (last visited on Oct. 31, 2005).

[118] Interview with Brian Kammer, Georgia Appellate Practice and Educational Resource Center (Oct. 2005).

[119] In the Northern District of Georgia, however, the practice is to require two attorneys. *See* E-mail Interview with Stephanie Kearns, Executive Director, Federal Defender Program, Inc., for the Northern District of Georgia (Oct. 2005); *see also* Plan of the United States District Court for the Northern District of Georgia Pursuant to The Criminal Justice Act of 1964, As Amended, Appendix D, *at* http://www.gand.uscourts.gov/documents/NDGARulesAppD.pdf (last visited on Oct. 31, 2005) (stating that "[d]ue to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two counsel who may both be staff attorneys of the [CHU], who are experience in handling death penalty cases").

[120] 21 U.S.C. § 848(q)(4)(B) (2004); *McFarland*, 512 U.S. at 856-57.

[121] 21 U.S.C. § 848(q)(6) (2004).

[122] 21 U.S.C. § 848(q)(7) (2004).

[123] E-mail Interview with Stephanie Kearns, Executive Director, Federal Defender Program, Inc., for the Northern District of Georgia, and Susan Casey, Esq. (May 2005).

[124] 21 U.S.C. § 848(q)(9) (2004).

[125] 21 U.S.C. § 848(q)(10)(B) (2004).

1. The Federal Defender Program, Inc.

In the Northern District of Georgia, the Capital Habeas Unit of the Federal Defender Program, Inc., handles all federal habeas cases except in cases of a conflict of interest.[126] The number of lawyers employed in the CHU is based on the number of federal post-conviction cases the office is assigned to handle.[127] As of May 2005, there were four full time attorneys and one part-time attorney representing clients in fourteen habeas cases, and an additional thirty-four cases were being monitored as they proceed through the state habeas process.[128]

All CHU attorneys are required to comply with the qualification requirements contained in section 848(q)(6) of Title 28 of the United States Code[129] and are encouraged, but not required, to attend training programs, conferences and seminars.[130] Complaints about any CHU attorney's performance may be made directly to the judge or to the Executive Director of the Federal Defender Program, Inc.[131]

---

[126] *See supra* note 117.

[127] E-mail Interview with Stephanie Kearns, Executive Director, Federal Defender Program, Inc., for the Northern District of Georgia, and Susan Casey, Esq. (May 2005).

[128] *Id.*

[129] *See* Plan of the United States District Court for the Northern District of Georgia Pursuant to The Criminal Justice Act of 1964, As Amended, Appendix D, *at* http://www.gand.uscourts.gov/documents/NDGARulesAppD.pdf (last visited on Oct. 31, 2005).

[130] E-mail Interview with Stephanie Kearns, Executive Director, Federal Defender Program, Inc., for the Northern District of Georgia, and Susan Casey, Esq. (May 2005).

[131] *Id.*

II. ANALYSIS

A. Recommendation # 1

> **In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings – pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):**

The State of Georgia does not guarantee counsel at every stage of the legal proceedings. Rather, the Georgia Supreme Court, in *Gibson v. Turpin*,[132] found that death-sentenced inmates do not have a right to appointed counsel after direct review by the Georgia Supreme Court.[133] Federal law, however, guarantees indigent death-sentenced inmates the right to appointed counsel for federal habeas corpus proceedings.[134] Based on *Gibson* and prevailing state and federal law, indigent individuals charged with or convicted of a capital offense in the State of Georgia have a right to appointed counsel only during pre-trial proceedings, trial and direct appeal, and federal habeas corpus proceedings. Death-sentenced inmates petitioning for state habeas corpus and clemency are not entitled to appointed counsel.

Indigent individuals entitled to appointed counsel at pre-trial proceedings and during trial and direct appeal must be appointed counsel from the Office of the Georgia Capital Defender (GCD), or in cases of conflict of interest, a conflict attorney, "as soon as is feasible and no more than 72 hours after the indigent person is taken into custody or service is made upon him or her of the charge, petition, notice, or other initiating process."[135] Similarly, death-sentenced inmates entitled to appointed counsel for federal habeas corpus must be appointed counsel prior to the filing of a formal, legally sufficient habeas petition.[136]

Despite the fact that Georgia law does not provide representation to death-sentenced inmates petitioning for state habeas relief, some organizations and individual attorneys in Georgia provide pro bono representation to these inmates.[137] However, due to limited resources and personnel, these organizations and attorneys are incapable of representing

---

[132] 513 S.E.2d 186 (1999)
[133] *Id.*
[134] *See* 21 U.S.C. § 848(q)(4)(B) (2004); McFarland v. Scott, 512 U.S. 849, 856-57 (1994)
[135] *See* O.C.G.A.§ 17-12-23(b) (2005); *see also* GA. UNIF. SUPER. CT. R. 33.2(A) (requiring counsel be appointed before the defendant pleads to the charges, which generally occurs at the arraignment).
[136] *See* 21 U.S.C. § 848(q)(4)(B) (2004); *McFarland*, 512 U.S. at 856-57.
[137] *See* SPANGENBERG REPORT, *supra* note 3, at 59.

all death-sentenced inmates petitioning for state habeas relief. For example, the Georgia Appellate Practice and Resource Center (Resource Center)[138] has only four attorneys on staff, including the director,[139] who, as of May 2005, were serving as co-counsel or providing substantial assistance in approximately sixty pending state habeas death penalty cases.[140] Indigent death-sentenced inmates not represented by the Resource Center, other organizations, or individual attorneys are, therefore, left to represent themselves. In fact, as of January 18, 2005, "seven of Georgia's death-row inmates in their final rounds of appeals ha[d] no lawyer to represent them, the highest number in more than a decade."[141]

a. At least two attorneys at every stage of the proceedings qualified in accordance with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 5.1 (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.

Given that death-sentenced inmates are not entitled to appointed counsel for state habeas corpus or clemency proceedings, Georgia law only contains regulations on the number of attorneys that should be appointed at trial and on direct appeal. The Unified Appeal Procedure specifically requires that all indigent individuals charged with or convicted of a capital offense be appointed two attorneys at trial and recommends that two attorneys be appointed on direct appeal.[142] Georgia law also provides these attorneys with access to investigators and experts.[143]

Similarly, under federal law, indigent death-sentenced inmates seeking federal habeas corpus relief must be appointed "one or more attorneys"[144] and these attorneys have access to investigators, experts, or other services as are reasonably necessary for representation.[145]

The qualification requirements for attorneys appointed for trial, direct appeal, and federal habeas corpus proceedings will be discussed below under Recommendation #2.

b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or

---

[138] E-mail Interview with Stephanie Kearns, Executive Director, Federal Defender Program, Inc., for the Northern District of Georgia, and Susan Casey, Esq. (May 2005) (noting that the "Resource Center staff make decisions about cases in the Southern and Middle Districts in Georgia" and that "once the case moves into federal court, the volunteer lawyers from the state proceedings seek appointment in federal court, and the Federal Defender Program, Inc., usually also seeks appointment").

[139] *Id.*

[140] *Id.*

[141] Bill Rankin, *Prisoners on Death Row Face Appeals Alone*, ATLANTA J. CONST., Jan. 18, 2005.

[142] *See supra* note 77 and accompanying text.

[143] *See supra* notes 97-106 and accompanying text.

[144] *See supra* note 120 and accompanying text.

[145] See *supra* note 124 and accompanying text.

> **psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.**

Georgia law does not require at least one member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. However, the Unified Appeal Procedure requires all trial and appellate attorneys handling death penalty cases to receive at least ten hours of specialized training.[146] Trial attorneys must fulfill this requirement by taking training related to "death penalty defense," which could include, but is not required to include, training on screening individuals for the presence of mental or psychological disorders or impairments.[147]

Additionally, even though the State of Georgia does not explicitly require attorneys to take training on mental or psychological disorders or impairments, training on these issues is available to GCD attorneys and conflict attorneys who handle death penalty cases. In fact, all GCD attorneys receive training on mental retardation, and the GCD also offers two major death penalty seminars each year which emphasize issues surrounding mental retardation and mental health.[148] Attendance at the seminars is by invitation only and priority is given to attorneys with active death penalty cases in Georgia.[149]

The Office of Mental Health Advocate (OMHA) also offers to interested defense attorneys programs on recognizing mental disorders.[150] The last OMHA seminar, offered in May 2005, was entitled "Defense Strategies for Evaluating, Placing, and Treating the Mentally Ill Client," and a portion of the seminar focused on distinguishing mental illness from mental retardation.[151] All of the OMHA seminars are elective and the frequency of seminars focusing on screening for the presence of mental or psychological disorders or impairments is unknown.

To the best of our knowledge, there are no equivalent programs available to other members of the defense team, such as investigators and mitigation specialists. The process for selecting investigators and experts will be discussed below under Subpart c.

---

[146] GA. UNIFIED APPEAL R. II(A)(1)-(2).

[147] *Id.*

[148] *See, e.g.*, Georgia Capital Defender, 13th Annual Capital Defense Training Seminar, "The Nitty-Gritty of Capital Defense," Agenda (Feb. 4-6, 2005) (on file with author); Annual Capital Defense Training Seminar, "We Who Believe In Justice Cannot Rest," Agenda (July 8-9, 2005) (on file with author).

[149] Georgia Capital Defenders, Training, *at* http://www.gacapdef.org/main.htm (last visited on Oct. 27, 2005).

[150] *See* Georgia Public Defender Standards Council, Mental Health Advocate, OHMA Mental Health Seminar, *at* http://www.gpdsc.com/omha-resources-seminars.htm (last visited Oct. 27, 2005).

[151] *See* Georgia Public Defender Standards Council, Mental Health Advocate, "Defense Strategies for Evaluating, Placing and Treating the Mentally Ill Client," Agenda, *at* http://www.gpdsc.com/omha-resources-seminars-agenda_051905.htm (last visited Oct. 27, 2005).

c. **A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.**
   i. **Counsel should have the right to seek such services through ex parte proceedings, thereby protecting confidential client information.**
   ii. **Counsel should have the right to have such services provided by persons independent of the government.**
   iii. **Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.**

Given that death-sentenced inmates are not entitled to appointed counsel or resources for investigators or experts during state habeas corpus and clemency proceedings, the State of Georgia only provides resources for investigators and experts to GCD and conflict attorneys handling death penalty cases at trial and direct appeal.

GCD and conflict attorneys are not required to seek funds from the court to hire any necessary experts or investigators. Rather, the GCD has on its staff ten investigators and one forensic social scientist, and it has a budget to hire any experts without requesting approval from the court.[152] Similarly, in cases in which the GCD is unable to represent the defendant due to a conflict of interest, the appointed conflict attorney does not have to apply to the court for experts or investigators.[153] The conflict attorney, however, is required to obtain pre-approval for the expenses associated with hiring an expert or investigator by submitting a form entitled "Request for Pre-Approval for an Expert Witness"[154] to the Deputy Director for Conflict Case Management at the Georgia Public Defender Standards Council.[155] Neither this form nor any of the other GPDSC forms appear to restrict the types of experts or investigators that the GCD or conflict attorneys are authorized to hire. Therefore, it appears that GCD and conflict attorneys may hire experts of their choosing, including those independent of the government, without having to approach the court for approval.

All of the costs associated with hiring investigators and experts for GCD and conflict attorneys come from the state funds appropriated to the GPDSC for use by the GCD, and the GCD has planned for and set aside money for experts for each expected case

---

[152] *See supra* notes 97-99 and accompanying text.

[153] Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_experts.pdf (last visited on Oct. 27, 2005).

[154] *See supra* note 101.

[155] Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_experts.pdf (last visited on Oct. 27, 2005).

requiring conflict attorneys.[156] The budget for the GCD, however, was based on a projected forty death penalty cases and an additional nine conflict death penalty cases per year.[157] As of early December 2005, forty-seven capital prosecutions—thirty-five handled by GCD and twelve handled by conflict defender—had commenced.[158] Thus, it remains to be seen whether there will be enough money in the GCD budget to allow GCD attorneys and conflict attorneys to hire all necessary experts.

Under federal law, indigent death-sentenced inmates petitioning for federal habeas corpus relief may request and the court may authorize inmates' attorneys to obtain investigative, expert, or other necessary services on behalf of the inmate.[159]

In conclusion, the State of Georgia does not require that indigent individuals charged with or convicted of a capital felony be appointed counsel and provided with resources for experts and investigators at every stage of the proceedings. It does require the appointment of two attorneys at trial and recommends two attorneys during direct appeal and provides these attorneys with resources for investigators and experts of their choosing, but it does not provide counsel or resources for investigators and experts to indigent death-sentenced inmates petitioning for state habeas corpus or clemency. Additionally, the State of Georgia does not require any member of the defense team to be qualified by experience or training to screen for mental or psychological disorders or defects. Based on this information, the State of Georgia is only in partial compliance with Recommendation #1

B. Recommendation # 2

Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

a. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

b. In formulating qualification standards, the jurisdiction should insure:

i. That every attorney representing a capital defendant has:

(a) obtained a license or permission to practice in the jurisdiction;

(b) demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

(c) satisfied the training requirements set forth in Guideline 8.1.

ii. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation.

---

[156] *See* Interview with Chris Adams, Georgia Capital Defender (May 20, 2005).

[157] *See* Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author); Georgia Public Defender Standards Council, Meeting Minutes (Aug. 22, 2003), *at* http://www.gpdsc.com/aboutus-council-minutes-minutes_08-22-03%20.pdf (last visited on Oct. 27, 2005).

[158] *See* Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

[159] *See supra* note 124 and accompanying text.

Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

(a) substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

(b) skill in the management and conduct of complex negotiations and litigation;

(c) skill in legal research, analysis, and the drafting of litigation documents;

(d) skill in oral advocacy;

(e) skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

(f) skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

(g) skill in the investigation, preparation, and presentation of mitigating evidence; and

(h) skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

The Georgia Public Defender Standards Council has adopted the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, apart from where they contradict Georgia law, as the "GPDSC Death Penalty Defense Standards."[160] The ABA Guidelines are posted on the GPDSC's website,[161] but the GPDSC has not identified or published a list of the Guidelines that contradict Georgia law. Assuming Guideline 5.1 (reproduced above as Recommendation #2) does not contradict Georgia law, all of the requirements contained therein would have been included as part of the GPDSC Death Penalty Standards adopted by the GPDSC. However, the GPDSC Death Penalty Defense Standards are not yet effective, as we have been told that they have been determined to have a "fiscal impact" thus requiring ratification by the General Assembly to become effective.

Regardless of the status of the GPDSC Death Penalty Defense Standards, the GCD treats the GPDSC Death Penalty Defense Standards as binding on the GCD. Therefore, if Guideline 5.1 does not contradict Georgia law, it would appear that all GCD attorneys would be required to possess the qualification requirements contained therein. But, it remains unclear whether all defense attorneys handling death penalty cases, including conflict attorneys, would be required to comply with Guideline 5.1.

Aside from Guideline 5.1, the O.C.G.A. and the Unified Appeal Procedure contain minimum qualification requirements for attorneys handling death penalty cases at trial and on direct appeal.[162] The qualification requirements vary for trial attorneys and appellate attorneys and for lead counsel and co-counsel, but apply to all attorneys handling death penalty cases at trial and on direct appeal, including GCD and conflict

---

[160] *See supra* note 66 and accompanying text.

[161] DEATH PENALTY DEFENSE STANDARDS, *supra* note 66.

[162] *See* supra notes 83-90 and accompanying text.

attorneys.[163] In fact, the form that conflict attorneys in death penalty cases are required to complete, the "Death Penalty Conflict Case Appointment Request and Application for Vendor Number,"[164] requires the attorneys to acknowledge that they are "in compliance with the provisions of the Supreme Court of Georgia's—Unified Appeal proceedings."[165]

The Unified Appeal Procedure's qualification requirements for lead trial attorneys are more expansive than the requirements for co-counsel at trial and lead and co-counsel on appeal, but still only include some of the requirements contained in Guideline 5.1. As required by Guideline 5.1, the Unified Appeal Procedure relies not only on quantitative measures of experience to determine whether an attorney is qualified to serve as a lead trial attorney, but also requires lead trial attorneys to have "demonstrated the necessary proficiency and commitment which exemplify the quality of representation necessary in capital cases."[166] Additionally, it requires lead trial attorneys to be members in good standing of the State Bar of Georgia, to be familiar and have experience with the utilization of expert witnesses and evidence, and to have specialized training.[167] However, the Unified Appeal Procedure does not require lead trial attorneys to have demonstrated skills in all of the areas contained in Guideline 5.1, such as legal research, analysis and writing, and the training required by the Unified Appeal Procedure falls short of the requirements of Guideline 5.1 (which will be discussed in detail under Recommendation #5).

In conclusion, we commend the GPDSC on adopting the *ABA Guidelines on the Appointment and Performance of Defense Attorneys in Death Penalty Cases* as the GPDSC Death Penalty Defense Standards, but we are unable to conclude that the State of Georgia has effective and enforceable qualification standards that comply with Guideline 5.1, as it is unclear whether Guideline 5.1 was adopted as part of the GPDSC Death Penalty Defense Standards and the standards are not yet effective. Even assuming that Guideline 5.1 was adopted as part of the GPDSC Death Penalty Defense Standards, it is unclear which defense attorneys, apart from GCD attorneys, would be required to comply with the qualification requirements. Aside from Guideline 5.1, however, the State of Georgia, pursuant to the Unified Appeal Procedure, does require all attorneys handling death penalty cases at trial and on direct appeal to possess some, but not all, of the qualification requirements contained in Guideline 5.1. The State of Georgia, therefore, is in partial compliance with Recommendation #2.

---

[163] *Id.*
[164] Death Penalty Conflict Case Appointment Request and Application for Vendor Number, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_vendor_app.doc (last visited on Oct. 27, 2005).
[165] *Id.*
[166] GA. UNIFIED APPEAL R. II(A)(1)(a).
[167] *Id.*

C. Recommendation # 3

The selection and evaluation process should include:

a. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Death Penalty Guidelines, Guideline 3.1 Designation of a Responsible Agency), such as:

i. A defender organization that is either:

(a) a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

(b) a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

ii. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

The State of Georgia does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony. Rather, this responsibility is divided among three entities: the Georgia Public Defender Standards Council (GPDSC), the Office of the Georgia Capital Defender (GCD), and the judiciary (in cases of conflict of interest).

Of these three entities, the GCD is the only entity wholly independent of the judiciary. The GCD is directed by a defense attorney (the Capital Defender), and it relies on its staff attorneys to represent at trial and on direct appeal all indigent individuals charged with or convicted of a capital felony, except in cases of a conflict of interest.[168] On the other hand, the Georgia Public Defender's Standards Council is composed of attorneys and judges,[169] who, with the assistance of the Director of the GPDSC, manage the GCD, establish standards relevant to capital defense, and monitor the performance of GCD attorneys.[170] Even though the composition of the GPDSC includes judges, all members are required to have "significant experience working in the criminal justice system or [] have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants"[171] and the overall goal of the GPDSC is to "assur[e] that adequate and effective legal representation is provided, independently of

---

[168] *See supra* notes 46-49 and accompanying text.

[169] Georgia Public Defender Standards Council, Council Members, *at* http://www.gpdsc.com/aboutus-council-members.htm (last visited Oct. 27, 2005).

[170] *See supra* notes 27-29, 48 and accompanying text.

[171] *See supra* note 25 and accompanying text.

political considerations or private interests, to indigent persons who are entitled to representation."[172]

The responsibilities of these entities with regard to the training, selection, and monitoring of counsel will be discussed in detail in Subparts b and c. But, we note that these responsibilities relate only to the training, selection, and monitoring of counsel at trial and on direct appeal, given that the State of Georgia does not provide appointed counsel to indigent death-sentenced inmates petitioning for state habeas corpus or clemency proceedings.

b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

To the best of our knowledge, no entity within the State of Georgia has developed and/or maintains a roster of eligible lawyers for each phase of representation, including trial and direct appeal.

We note, however, that attorneys requesting appointment as a conflict attorney to a death penalty trial or direct appeal are required to submit to the GPDSC a form entitled "Death Penalty Conflict Case Appointment Request and Application for Vendor Number" in order to be appointed and to obtain a vendor number, which is used by the attorney when submitting his/her fee claim.[173] It is, therefore, conceivable that the GPDSC maintains a list of the attorneys that have submitted "Death Penalty Conflict Case Appointment Request and Application for Vendor Number" forms and/or a list of the attorneys that have been granted vendor numbers. If the granting of a vendor number means that the attorney is "eligible" to handle a death penalty trial or direct appeal and the GPDSC maintains a list of attorneys that have been granted vendor numbers, then a list of "eligible" attorneys may exist in Georgia. But, we do not have knowledge of any list and it does not appear that judges use any kind of list to appoint attorneys in cases of a conflict of interest.

c. The statewide independent appointing authority should perform the following duties:

As indicated above, the State of Georgia does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony. Rather, this responsibility is divided among the GPDSC, the GCD, and the judiciary (in cases of conflict of interest).

i. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

---

[172] *See supra* note 19 and accompanying text.
[173] *See supra* note 64 and accompanying text.

The Capital Defender is charged with recruiting and hiring, with the advice and consent of the GPDSC, attorneys to represent indigent individuals charged with or convicted of a capital felony except in cases of conflict of interest.[174] The Capital Defender, however, is not required to certify these attorneys as qualified to handle death penalty cases. Additionally, unless the process of granting a vendor number to a conflict attorney certifies the attorney as qualified for appointment, it does not appear that the GPDSC certifies conflict attorneys as qualified to handle death penalty cases. Similarly, even though the judiciary is responsible for ensuring that all attorneys handling death penalty cases, including GCD attorneys and conflict attorneys, possess the qualifications requirements contained in the Unified Appeal Procedure,[175] judges are not required to certify these attorneys as qualified.

ii. draft and periodically publish rosters of certified attorneys;

As indicated above, it does not appear that any entity has drafted and/or periodically publishes a roster of certified attorneys in Georgia.

iii. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

It does not appear that any entity within the State of Georgia has drafted and/or periodically publishes certification standards and procedures by which attorneys are certified and assigned to particular cases.

iv. assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

The responsibility for assigning attorneys to represent indigent defendants in death penalty cases is divided between the GCD and the judiciary. The GCD is charged with representing at trial and on direct appeal indigent individuals charged with or convicted of a capital felony unless there is a conflict of interest.[176] In cases of a conflict of interest, the judiciary is responsible for appointing counsel.[177] These requirements, however, extend only to death penalty trials and direct appeals, as indigent death-sentenced inmates do not have the right to appointed counsel for state habeas corpus and clemency proceedings.

v. monitor the performance of all attorneys providing representation in capital proceedings;

---

[174] *See supra* note 49 and accompanying text.
[175] *See supra* note 86 and accompanying text.
[176] *See supra* notes 75-76 and accompanying text.
[177] *Id.*

When adopting the GPDSC Death Penalty Defense Standards, the GPDSC accepted responsibility for monitoring the GCD, but in cases of conflict of interest, the GPDSC relies on the judiciary to monitor and remove attorneys who fail to provide high quality legal representation.[178] However, if the GPDSC is made aware of an attorney's deficient performance, the GPDSC "may attempt to investigate the problems and document them for the judge."[179]

vi. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;

Given that there does not appear to be a roster of qualified attorneys, there is no mechanism for removing attorneys who fail to provide high quality legal representation.

vii. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

The GPDSC is authorized to conduct and approve training programs, but it appears that these programs are for circuit public defenders, rather than for attorneys handling death penalty cases.[180] The GCD, however, conducts and sponsors two specialized training programs each year that focus on representing defendants in death penalty cases.[181]

viii. investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

Given that the GDPSC and the judiciary have divided the responsibility for monitoring attorneys who handle death penalty cases, it would appear that the duty to investigate and maintain records concerning complaints about the performance of these attorneys would be shouldered by these two entities respectively. But it is unclear whether either entity is currently investigating and maintaining records concerning complaints about the performance of attorneys providing representation in death penalty cases and taking appropriate corrective action without delay.

In conclusion, the State of Georgia has failed to remove the judiciary from the attorney training, selection, and monitoring process. Not only is the GPDSC—the body responsible for "assuring [] adequate and effective legal representation . . . independently of political considerations or private interests"—composed partially of judges, but the State of Georgia requires judges to appoint attorneys and to monitor the performance of these attorneys in cases of a conflict of interest. Additionally, the State of Georgia has not vested with one or more independent entities all of the responsibilities contained in

---

178 DEATH PENALTY DEFENSE STANDARDS, *supra* note 66.
179 *Id.*
180 O.C.G.A. § 17-12-9 (2005).
181 *See* supra notes 94-96 and accompanying text.

Recommendation #3. For example, no independent entity within the State of Georgia is responsible for drafting or publishing a roster of certified attorneys or for monitoring, investigating, and maintaining records concerning the performance of all attorneys handling death penalty cases. Based on this information, the State of Georgia is not in compliance with Recommendation #3.

D. Recommendation # 4

Compensation for Defense Team (Guideline 9.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

a. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by the ABA Guideline 9.1, by the defense team and outside experts selected by counsel.[182]

The State of Georgia provides funding to the GCD for its staff, including GCD attorneys, clerks, investigators, paraprofessionals, administrative assistants, and for conflict attorneys and any necessary investigators and experts. The budget for the GCD was based on a projected forty death penalty cases and an additional nine conflict death penalty cases per year.[183] For these conflict cases, the GCD set aside in the GCD budget approximately $360,000 per case—$240,000 for attorneys fees and $120,000 for experts and investigation.[184] However, as of early December 2005, forty-seven capital prosecutions had commenced.[185] Thus, it remains to be seen whether there will be enough money in the GCD budget to cover the costs associated with all of these cases.

Although the State of Georgia does not provide counsel or resources to indigent death-sentenced inmates petitioning for state habeas corpus or clemency relief, it does provide limited funding—approximately $800,000 per year—to the Georgia Appellate Practice and Resource Center, which provides assistance to death-sentenced inmates seeking state habeas corpus relief and/or federal habeas corpus relief.

b. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

---

[182] In order for a state to ensure funding for the "full cost of high quality legal representation," it must be responsible for "paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g. Guideline 4.1 [Recommendation #1], Guideline 8.1 [Recommendation #5])." *See* American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984-85 (2003).

[183] Georgia Public Defender Standards Council, Meeting Minutes (Aug. 22, 2003), *at* http://www.gpdsc.com/aboutus-council-minutes-minutes_08-22-03%20.pdf (last visited on Oct. 28, 2005).

[184] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

[185] *Id.*

i. **Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**
ii. **Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**
iii. **Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

The compensation for representing an indigent individual charged with a capital felony depends on whether the attorney is a GCD attorney or a conflict attorney appointed by the court. All GCD attorneys are salaried employees earning between $68,000 and $89,000.[186] The GCD determined this salary by consulting the State Merit System of Personnel Administration (State Merit System) for an analysis of workload.[187] The salaries of assistant district attorneys are also based on the State Merit System, but the salaries for assistant district attorneys range from $38,892 to $89,034.[188] This salary range, however, is not limited to assistant district attorneys who routinely handle death penalty cases, but includes all assistant district attorneys. Therefore, although it appears that the ranges for GCD attorneys and assistant district attorneys are nearly commensurate, we cannot state this with any certainty, as the specific salary range for assistant district attorneys who routinely handle death penalty cases is unknown.

In contrast, conflict attorneys handling death penalty trials and direct appeals are "paid with state funds appropriated to the [GPDSC] for use by the [GCD]"[189] at an hourly rate of $125.00.[190] This rate applies to both in and out of court work and there does not appear to be a cap on the amount of compensation an attorney can receive for his/her work. Additionally, the GPDSC provides for periodic billing and payment to conflict attorneys.[191]

c. **Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
   i. **Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**

---

[186] *See supra* note 58 and accompanying text.
[187] *See supra* note 57 and accompanying text.
[188] State of Georgia Merit System, Alphabetic List of Job Titles, *at* http://www.gms.state.ga.us/jobdescriptions/downloads/alphabetic.pdf (last visited on Oct. 28, 2005).
[189] *See supra* note 59 and accompanying text.
[190] *See supra* note 65 and accompanying text.
[191] Georgia Public Defender Standards Council, Death Penalty Conflict Defender Fee Claim Form, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp-fee_claim.doc (last visited on Oct. 28, 2005).

ii. **Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**

iii. **Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

The GCD currently employs ten investigators and one forensic social worker.[192] Investigators appointed to assist a circuit public defender with the preparation of cases for trial are compensated based on a salary range that is not less than $30,828.00 but no more than 70 percent of the compensation of the circuit public defender from state funds,[193] but this salary range appears to apply only to investigators with the circuit public defender offices and not to those with the GCD. Given that the salary range for GCD investigators and experts is unknown, we cannot assess whether the salaries for these employees are commensurate with the salary scale of the prosecutor's office. Similarly, the rate and manner by which experts and investigators hired by GCD or conflict attorneys are paid is also unclear.

d. Additional compensation should be provided in unusually protracted or extraordinary cases.

In unusually protracted or extraordinary cases in which a GCD attorney is providing representation, the issue of additional compensation is technically not a concern as these attorneys are salaried employees.[194] Similarly, in cases in which an appointed attorney is providing representation, it appears that these attorneys would be compensated for their time in protracted or extraordinary cases given that these attorneys are paid at an hourly rate.[195]

e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

Based on the text of the GPDSC "Death Penalty Conflict Defender Claim Form," it appears that conflict attorneys may be reimbursed for "other expenses," including mileage, which is reimbursed at .485 per mile.[196]

---

[192] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

[193] O.C.G.A. § 17-12-28(d) (2005).

[194] *See supra* note 58.

[195] *See supra* note 65.

[196] Georgia Public Defender Standards Council, Death Penalty Conflict Defender Fee Claim Form, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp-fee_claim.doc (last visited on Oct. 27, 2005); *see also* Georgia Public Defender Standards Counsel, Announcements and Forms, *at* http://www.gpdsc.com/cpdsystem-cpdinfo-main.htm (last visited Oct. 28, 2005) (stating that effective Sept. 10, 2005, the state mileage reimbursement rate increased from .28 to .485 per mile).

In conclusion, we did not obtain sufficient information about the GCD budget to appropriately assess whether the State of Georgia has ensured funding for the full cost of high quality legal representation. We note, however, that if the number of death penalty cases has surpassed the number of cases for which the GCD budget was based upon, the sufficiency of funds provided to the GCD may be in question. Additionally, we cannot assess parity between GCD attorneys and assistant district attorneys and between GCD investigators or experts and assistant district attorneys with respect to salaries, as the salaries paid to assistant district attorneys who routinely handle death penalty cases is unknown and the salaries paid to GCD investigators and experts is unknown. Therefore, we are unable to assess whether the State of Georgia is in compliance with Recommendation #4.

E. Recommendation #5

Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

The State of Georgia provides funding for the training, professional development, and continuing education for some, but not all, members of the defense team. The GPDSC is authorized to conduct and approve training programs, but it appears that these programs are for circuit public defenders, rather than for attorneys handling death penalty cases.[197] The GCD, however, conducts and sponsors two specialized training programs each year that focus on representing defendants in death penalty cases.[198] In addition to training programs for attorneys, the GPDSC also provides training for investigators and forensic scientists.[199]

Additionally, the State Bar of Georgia requires attorneys to participate in a minimum of twelve hours of continuing legal education each year.[200] For trial attorneys, the twelve

---

[197] O.C.G.A. § 17-12-9 (2005).

[198] Georgia Capital Defender, Training, *at* http://www.gacapdef.org/main.htm (last visited on Oct. 28, 2005); *see, e.g.*, Georgia Capital Defender, 13th Annual Capital Defense Training Seminar, "The Nitty-Gritty of Capital Defense," Agenda (Feb. 4-6, 2005) (on file with author); Agenda, "We Who Believe In Justice Cannot Rest," Annual Capital Defense Training Seminar (July 8-9, 2005) (on file with author).

[199] Georgia Public Defender Standards Council, 2005 Training Schedule, *at* http://www.gpdsc.com/resources-training-main.htm (last visited on Oct. 28, 2005).

[200] STATE BAR OF GA., 2005-2006 HANDBOOK R. 8-104, at H-143 (rule on Education Requirements and Exemptions), *at* http://www.gabar.org/handbook/part_viii_continuing_lawyer_competency/rule_8-104_education_requirements_and_exemptions/ (last visited on Oct. 28, 2005); *see also* State Bar of Georgia, Mandatory Continuing Legal Education FAQ, *at* http://www.gabar.org/programs/continuing_legal_education/mandatory_continuing_legal_education_faq/ (last visited on Oct. 28, 2005).

hours must include at least three hours of trial practice.[201] Accredited CLE sponsors within the State of Georgia include the GPDSC, the Georgia Association of Criminal Defense Lawyers, and Georgia Defense Lawyers Association.[202]

b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

i. relevant state, federal, and international law;
ii. pleading and motion practice;
iii. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
iv. jury selection;
v. trial preparation and presentation, including the use of experts;
vi. ethical considerations particular to capital defense representation;
vii. preservation of the record and of issues for post-conviction review;
viii. counsel's relationship with the client and his family;
ix. post-conviction litigation in state and federal courts;
x. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
xi. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

When adopting the ABA Guidelines as the GPDSC Death Penalty Defense Standards, the GPDSC noted that, "Guideline 8.1 requires training and professional development by members of the defense team and invites GPDSC to adopt a minimum training standard for Georgia."[203] As a result, the GPDSC adopted and endorsed the preexisting training requirements contained in the Unified Appeal Procedure.[204] Unified Appeal Rule II(A) specifically requires all trial attorneys and appellate attorneys handling death penalty cases to receive at least ten hours of specialized training within twelve months prior to appointment or agree to take the ten hours during the pendency of the trial.[205]

The Unified Appeal Procedure does not require the specialized training to include presentations and training on all of the issues listed above. Rather, it only requires that the trial attorneys' training to be on "death penalty defense" while the appellate attorneys' training must relate to "post-conviction appeals and appellate procedures

---

[201] State Bar of Georgia, Mandatory Continuing Legal Education FAQ, *at* http://www.gabar.org/programs/continuing_legal_education/mandatory_continuing_legal_education_faq/ (last visited on Oct. 28, 2005).
[202] State Bar of Georgia, Accredited CLE Sponsors, *at* http://www.gabar.org/programs/continuing_legal_education/accredited_cle_sponsors/ (last visited on Oct. 28, 2005).
[203] DEATH PENALTY DEFENSE STANDARDS, *supra* note 66.
[204] *Id.*
[205] GA. UNIFIED APPEAL R. II(A).

relating to post-conviction appeals."[206] Training on "death penalty defense" certainly could include presentations and training on all of the issues listed above, but attorneys are not required to take training that covers all of these issues.

c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.

As discussed under Recommendation #3, it does not appear that any entity within the State of Georgia has developed and/or maintains a roster of eligible attorneys. Regardless, the Unified Appeal Procedure does require attorneys handling death penalty trials or direct appeals to complete ten hours of specialized training before being appointed or during the pendency of a death penalty trial.[207]

d. The jurisdiction should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

As indicated above, the GPDSC offers training to investigators and forensic scientists,[208] but these individuals and other non-attorneys in the defense team are not required to take such training.

In conclusion, the State of Georgia provides funding for training, professional development, and continuing legal education for some, but not all, members of the defense team. Therefore, the State of Georgia is only in partial compliance with Recommendation #5.

---

[206] *Id.*
[207] *Id.*
[208] See supra note 199 and accompanying text.

CHAPTER SEVEN

THE DIRECT APPEAL PROCESS

INTRODUCTION TO THE ISSUE

Every death-row inmate must be afforded at least one level of judicial review.[1] This process of judicial review is called the direct appeal. As the U.S. Supreme Court stated in *Barefoot v. Estelle*, "[d]irect appeal is the primary avenue for review of a conviction of sentence, and death penalty cases are no exception."[2] The direct appeal process in capital cases is designed to correct any errors in the trial court's findings of fact and law and to determine whether the trial court's actions during the guilt/innocence and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure that the direct appeals process works as it is intended is through meaningful comparative proportionality review. Comparative proportionality review is the process through which a sentence of death is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate. Meaningful comparative proportionality review helps to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases, juries determine the sentence, yet they are not equipped and do not have the information necessary to evaluate the propriety of that sentence in light of the sentences in similar cases. In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Simply stating that a particular death sentence is proportional is not enough, however. Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence. In addition, proportionality review should include cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought, but was not.

---

[1] Gregg v. Georgia, 428 U.S. 153 (1976).
[2] Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

I. FACTUAL DISCUSSION

The defendant may challenge his/her conviction and death sentence by filing a notice of direct appeal with the Georgia Supreme Court[3] within 30 days of the entry of his/her judgment and sentence, except in cases in which the defendant filed a motion for a new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict.[4] In these cases, the notice must be filed within thirty days after the entry of the order on the motion.[5] One filing extension, not to exceed thirty days, may be granted at the discretion of the Court.[6]

However, the defendant need not file an appeal.[7] If the defendant does not initiate any sort of review and does not file a motion for new trial,[8] the case will automatically be appealed to the Georgia Supreme Court within ten days of the filing of the trial transcript by the court reporter of the superior court.[9] This automatic review of the defendant's death sentence will occur even if the defendant does not wish to appeal his/her conviction or sentence.[10]

A. Review of the Defendant's Death Sentence

Regardless of whether the defendant files a direct appeal enumerating assertions of trial court error, the Georgia Supreme Court must review all death sentences.[11] If a direct appeal is filed, it must be consolidated with the Georgia Supreme Court's review of the defendant's death sentence.[12] In cases in which the defendant does not file a notice of appeal, the state and defense counsel may submit briefs and present oral arguments on the issue of the death sentence.[13]

In reviewing the death sentence, the Court must determine the following:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

---

[3] O.C.G.A. §§ 5-6-34(a)(1), -37 (2005). For a review of rules relating to time requirements for filing a notice of appeal and appellate briefs, and parameters of oral arguments, see *supra* ch. 1, pt. III.D.2.

[4] O.C.G.A. § 5-6-38(a) (2005).

[5] *Id.*

[6] O.C.G.A. § 5-6-39(a)(1), (c) (2005).

[7] GA. UNIFIED APPEAL R. IV(A)(3)(a); O.C.G.A. § 17-10-35 (2005).

[8] Georgia provides an outlet for review before one files a direct appeal. The "sole function" of this motion for new trial is to "bring to the attention of the superior court after imposition of sentence such grounds as defense counsel may wish the trial court to decide." GA. UNIFIED APPEAL R. IV(A)(2).

[9] GA. UNIFIED APPEAL R. IV(A)(3)(a)(1); O.C.G.A. § 17-10-35 (2005).

[10] GA. UNIFIED APPEAL R. IV(A)(1)(a).

[11] GA. UNIFIED APPEAL R. IV(A)(1)(a), (A)(3)(a)(2).

[12] O.C.G.A. § 17-10-35(f) (2005).

[13] O.C.G.A. § 17-10-35(d) (2005).

2. Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and
3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[14]

1. Imposing a Death Sentence Under the Influence of Passion, Prejudice, or Any Other Arbitrary Factor.

The Georgia Supreme Court has defined "passion" as not encompassing all emotion, "but only that engendered by prejudice, particularly racial prejudice . . . or [prejudice towards] religious preference."[15] The term "arbitrary factor" also refers to those factors used in the decision to impose the death penalty, such as race or religion,[16] or the victim's class or wealth.[17]

In considering whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, the Court must consider whether "any allegedly-improper arguments that were not objected to at trial in reasonable probability" changed the jury's "exercise of discretion to elect between life imprisonment and death."[18]

Some legitimate victim impact evidence could "inflame or unduly prejudice a jury if admitted in excess."[19] Additionally, a closing argument, considered in its entirety, may be "so prejudicial or offensive, or involve[] such egregious misconduct on the part of the prosecutor as to require reversal" on the basis that the death sentence was "impermissibly influenced by passion, prejudice, or another arbitrary factor.[20]

2. Sufficiency of the Evidence Found to Support the Jury's or Judge's Finding of a Statutory Aggravating Circumstance

In assessing the sufficiency of the evidence supporting a defendant's death sentence, the Georgia Supreme Court will first identify the statutory aggravating circumstance(s)[21] that

---

[14] O.C.G.A. § 17-10-35(c) (2005).
[15] Livingston v. State, 444 S.E.2d 748, 751 (Ga. 1994) (quoting Connor v. State, 303 S.E.2d 266, 275 (Ga. 1983)).
[16] Lawler v. State, 576 S.E.2d 841, 846 (Ga. 2003).
[17] *Livingston*, 444 S.E.2d at 751.
[18] Gissendaner v. State, 532 S.E.2d 677, 688 (Ga. 2000) (concluding that there was not a reasonable probability that the comment in the prosecutor's closing argument that the defendant was "evil" changed the jury's exercise of discretion in choosing between life imprisonment and death).
[19] *Livingston*, 444 S.E.2d at 751.
[20] Spivey v. State, 319 S.E.2d 420, 427 (Ga. 1984); *see also* Ingram v. State, 323 S.E.2d 801, 814 (Ga. 1984).
[21] O.C.G.A. § 17-10-30 (2005).

the jury or the judge relied on for its imposition of a death sentence.[22] The Court will then review the relevant evidence presented at both the guilt/innocence and sentencing phases to determine whether the evidence presented was sufficient to support the claimed aggravating circumstance(s) beyond a reasonable doubt.[23]

3. Imposing a Death Sentence That Is Excessive or Disproportionate to the Penalty Imposed in Similar Cases, Considering Both the Crime and the Defendant

Section 17-10-35(c)(3) of the O.C.G.A. requires that, in reviewing the proportionality of a defendant's death sentence, the Court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[24] The Georgia Supreme Court, noting that the facts surrounding two capital felony cases will rarely be "exactly alike," is not required to find identical cases for comparison when performing the proportionality review.[25] Additionally, in cases where multiple defendants have received different sentences (e.g., one life imprisonment without the possibility of parole and the other death), the Court will take into account the "difference in age and the extent of admitted culpability" of each defendant in determining whether a particular death sentence is disproportionate to that of the co-conspirator.[26]

Both state and federal case law have prohibited the imposition of the death penalty for the offenses of armed robbery, rape, and kidnapping for ransom or with bodily injury where the victim is not killed, because the death penalty is excessive and disproportionate either to the crimes themselves or to the sentences imposed in similar cases.[27] Regardless of whether the Georgia Supreme Court finds that the death sentence is or is not

---

[22] *See, e.g.*, Presnell v. State, 551 S.E.2d 723, 727-28 (Ga. 2001) (noting that the jury found beyond a reasonable doubt the defendant committed the murder while engaged in the commission of kidnapping with bodily injury and that the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture and depravity of mind).

[23] *See, e.g.*, Riley v. State, 604 S.E.2d 488, 493-94 (Ga. 2004) (considering facts about the crime and the defendant adduced at trial); *Presnell*, 551 S.E.2d at 728 (considering facts adduced at the re-sentencing phase).

[24] O.C.G.A. § 17-10-35(c)(3) (2005).

[25] Wilson v. Zant, 290 S.E.2d 442, 454 (Ga. 1982), *overruled on other grounds by* Morgan v. State, 476 S.E.2d 747, 749-50 (Ga. 1996).

[26] Allen v. State, 321 S.E.2d 710, 716 (Ga. 1984).

[27] *See* Coker v. Georgia, 433 U.S. 584, 591 (1977); Eberheart v. Georgia, 433 U.S. 917 (1977), *rev'g* 206 S.E.2d 12 (Ga. 1974); Collins v. State, 236 S.E.2d 759, 760-61 (Ga. 1977), s*uperseded by constitutional amendment*, Ga. Const. art. VI, § VI, paras. II, III, *as recognized in* Collins v. American Tel. & Tel. Co., 456 S.E.2d 50 (Ga. 1995); Jarrell v. State, 216 S.E.2d 258, 270 (Ga. 1975); Floyd v. State, 210 S.E.2d 810, 814 (Ga. 1974); Gregg v. State, 210 S.E.2d 659, 667 (Ga. 1974); *see also* Sears v. State, 514 S.E.2d 426, 434 (Ga. 1999) (recognizing a sentence of death for the offense of kidnapping with bodily injury may be imposed where the victim was killed); Moore v. State, 243 S.E.2d 1, 11 (Ga. 1978) (upholding a sentence of death for the offense of rape where the victim was raped and then killed); Stanley v. State, 241 S.E.2d 173, 180 (Ga. 1977) (upholding a sentence of death for the offense of kidnapping with bodily injury where the victim was killed).

disproportionate or excessive in light of the acts committed by the defendant, it must provide an appendix to the opinion identifying the list of similar cases it considered in performing its proportionality review.[28]

B. Types of Reviewable Trial Errors

The Georgia Supreme Court will consider the following types of trial error on direct appeal from a capital conviction and sentence of death:

1. Trial Errors Properly Preserved in the Superior Court and Timely Raised and/or Argued in the Georgia Supreme Court

Generally, the Georgia Supreme Court will not consider grounds that were not first properly raised before the trial court.[29] "In order to [properly] preserve an objection upon a specific ground for appeal, the objection must be made at trial upon that specific ground,"[30] and the defendant's objection itself must be specific and not merely a statement that s/he objects.[31] Thus, a failure to make a specific and timely objection to error at trial may be treated as a waiver on appeal. In addition to requiring the defendant to properly preserve trial court error, s/he must also timely "raise[] and/or argue[]" these errors in the Georgia Supreme Court, except in cases of plain error, to avoid a waiver of those grounds on appeal.[32]

Although the Georgia Supreme Court must review errors timely preserved in the superior court, regardless of whether an assertion of error was subsequently presented to the superior court by motion for a new trial,[33] where the defendant receives new counsel for his motion for new trial and fails to raise claims of ineffective assistance of trial counsel, those claims are waived if raised for the first time on appeal.[34] However, claims of ineffective assistance of trial counsel may be raised for the first time on appeal if the direct appeal marks the first appearance of new counsel.[35]

---

[28] *See* O.C.G.A. § 17-10-35(e) (2005); *see, e.g.*, Lewis v. State, 592 S.E.2d 405, 409 (Ga. 2004).

[29] Scott v. State, 507 S.E.2d 728, 729 (Ga. 1998) (quoting Barnes v. State, 496 S.E.2d 674, 687 (Ga. 1998)).

[30] Villegas v. State, 558 S.E.2d 808, 809 (Ga. Ct. App. 2002).

[31] Lancaster v. State, 558 S.E.2d 772, 773 (Ga. Ct. App. 2002).

[32] Lynd v. State, 414 S.E.2d 5, 8 (Ga. 1992); GA. UNIFIED APPEAL R. IV(B)(2).

[33] GA. UNIFIED APPEAL R. IV(B)(2).

[34] Thompson v. State, 359 S.E.2d 664, 665 (Ga. 1987) (holding that where trial counsel files motion for new trial but new counsel files amended motion without raising claim of ineffectiveness of trial counsel, that claim will be waived if raised for the first time on appeal).

[35] *See* Owens v. State, 428 S.E.2d 793, 796 (Ga. 1993); Johnson v. State, 383 S.E.2d 115, 117 (Ga. 1989) (remanding to the trial court for an evidentiary hearing on the issue of ineffective assistance of trial counsel). It is unclear whether not raising a claim of ineffective assistance of trial counsel at first opportunity on direct appeal would bar this claim in a subsequent habeas corpus proceeding. However, in a non-death penalty case, the Georgia Supreme Court has suggested that a defendant "has a right to raise th[e] issue [of ineffective assistance of counsel] once and have the issue determined on the merits only once, either by direct appeal or in a habeas proceeding." State Bd. of Corr. v. Smith, 233 S.E.2d 797, 798-

2. Plain Error

When the defendant does not properly preserve trial court error for appeal or fails to timely raise that error on appeal, s/he waives that ground on appeal, unless the trial court error rises to the level of "plain error."[36] "Plain error" exists when the trial court's error "seriously affected the fairness, integrity, and public reputation of [the] judicial proceedings."[37] Although the Georgia Supreme Court allows for an exception to the procedural bar in the case of plain error, the Georgia Supreme Court has never found plain error in a case in which a death sentence was imposed.

C. Disposition of Appeal in Georgia Supreme Court

Following the review of the death sentence and any enumerations of error, the Georgia Supreme Court may affirm the death sentence, or set aside the death sentence and remand the case for resentencing, as well as *sua sponte* correct any errors found in the superior court proceedings[38] and vacate the conviction and remand to the superior court for further proceedings.

D. Discretionary Review by the United States Supreme Court

If the Georgia Supreme Court affirms the death sentence, the defendant may petition for a writ of *certiorari* with the United States Supreme Court.[39] The petition must be filed within ninety days of the judgment affirming the defendant's death sentence.[40] The United States Supreme Court may decline or accept the defendant's case for review.[41] If the United States Supreme Court reviews the case, the Court may affirm the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.[42]

---

99 (Ga. 1977). It is unclear whether the Court's decision applies to death cases, other than those where the defendant does not seek appeal and only has mandatory review of his sentence by the Supreme Court.

[36] *Lynd*, 414 S.E.2d at 8.

[37] Paul v. State, 537 S.E.2d 58, 61 (Ga. 2000) (quoting Almond v. State, 349 S.E.2d 482, 486 (Ga. Ct. App. 1986)); *see also Owens*, 428 S.E.2d at 795 (applying the plain error rule in a non-death penalty case).

[38] O.C.G.A. §§ 17-10-35(e)(1), (2) (2005).

[39] 28 U.S.C. § 1257(a) (2005).

[40] SUP. CT. R. 13(1).

[41] SUP. CT. R. 16(2), (3).

[42] 28 U.S.C. § 2106 (2005).

II. ANALYSIS

A. Recommendation #1

> **In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not.**

Section 17-10-35(c)(3) of the O.C.G.A. requires that, in performing the proportionality review of a defendant's death sentence on direct appeal, the Georgia Supreme Court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[43]

In performing its proportionality review by comparing sentences imposed in "similar cases," the Georgia Supreme Court could conceivably review cases in which (1) the death penalty was imposed, (2) death penalty was sought but not imposed, and (3) the death penalty could have been sought but was not. However, a thorough review of opinions in which the Georgia Supreme Court has upheld a death sentence as proportional in light of the acts committed by the defendant demonstrates that the Court does not conduct the expansive review required by this Recommendation. Rather, in cases in which a death sentence has been imposed on a defendant, the Court generally limits its review to and includes in its appendix[44] cases in which the death penalty was actually imposed upon similar circumstances.[45] In fact, in fifty-five death sentence cases between 1994 and 2004, the Georgia Supreme Court's proportionality review consisted of reviewing only cases in which a death sentence had been imposed.[46] It appears, however, that in cases in which a death sentence has been imposed on a defendant who committed the crime with a co-conspirator, the Court not only reviews cases where the death penalty has been

---

[43] O.C.G.A. § 17-10-35(c)(3) (2005)..

[44] *See* O.C.G.A. § 17-10-35(e) (2005).

[45] *See, e.g.*, Lewis v. State, 592 S.E.2d 405, 409 (Ga. 2004); Riley v. State, 604 S.E.2d 488, 500 (Ga. 2004); Brannan v. State, 561 S.E.2d 414, 429 (Ga. 2002); McPherson v. State, 553 S.E.2d 569, 578 (Ga. 2001).

[46] Note, Clark Calhoun, *Reviewing the Supreme Court's Efforts at Proportionality Review*, 39 GA. L. REV. 631, 657-58 (2005). In 1982, the Georgia Supreme Court noted that, in addition to cases in which the death penalty had been imposed, it considered cases in which the death penalty could have been imposed but was not. *Id.* (citing Horton v. State, 295 S.E.2d281, 289 n.9 (Ga. 1982)). As early as 1984, however, the Georgia Supreme Court had already rejected a claim that only using death sentence cases in its proportionality review was error. *See id.* (citing Felker v. State, 314 S.E.2d 621, 649 (Ga. 1984)). Since 1994, it appears that the Georgia Supreme Court no longer considers in its proportionality review cases where the death penalty was sought but not imposed. *Id.*

imposed, but also the case of and sentence imposed on the co-conspirator who received a sentence other than death.[47]

In its opinion, the Georgia Supreme Court will generally identify the nature of the offense committed and then state the outcome of its proportionality review.[48] A review of death penalty cases in Georgia reveals that the Georgia Supreme Court includes only a short explanation of the outcome of its proportionality review. This explanation generally consists of one or two sentences at the end of the opinion repeating the language of section 17-10-35(c)(3) by stating, "[T]he death sentence is not disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant. The similar cases listed in the Appendix support the imposition of the death penalty in this case."[49]

Given that the Georgia Supreme Court, in performing its proportionality review, generally only reviews cases in which a death sentence has been imposed, only expands that review to cases where the death penalty was not imposed upon a claim by the defendant that his/her sentence is disproportionate to that of his/her co-conspirator, and explains its proportionality review in a cursory manner, the State of Georgia only partially meets the requirements of Recommendation #1.

---

[47] *See, e.g.*, Gissendaner v. State, 532 S.E.2d 677, 691-92 (Ga. 2000); Waldrip v. State, 482 S.E. 2d 299, 313-14 (Ga. 1997) (noting that the fact that different juries hearing different evidence in separate cases of co-conspirators might arrive at different punishment does not establish a claim of disproportionality); Allen v. State, 321 S.E.2d 710, 716 (Ga. 1984).

[48] *See, e.g.*, *Lewis*, 592 S.E.2d at 409.

[49] Calhoun, *supra* note 46, at 657 (citing Pye v. State, 505 S.E.2d 4, 14 (Ga. 1998)).

CHAPTER EIGHT

STATE POST-CONVICTION PROCEEDINGS

INTRODUCTION TO THE ISSUE

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Very significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims; claims made possible by the discovery of crucial new evidence; claims based upon prosecutorial misconduct; unconstitutional racial discrimination in jury selection; and other meritorious constitutional claims.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, and it is often not possible until after direct appeal to uncover prosecutorial misconduct or other crucial evidence, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. Due to doctrines of exhaustion and procedural default, such claims, no matter how valid, must almost always be presented first to the state courts before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Among the latter are: a one-year statute of limitations on bringing federal habeas proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, U.S. Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death-row inmate to return to federal court a second time. Another factor limiting grants of federal habeas corpus relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal habeas that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage

frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death-row inmates from having valid claims heard or reviewed at all.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to get state court rulings on the merits of valid claims of harmful constitutional error. The numerous rounds of judicial proceedings does not mean that *any* court, state or federal, ever rules on the merits of the inmate's claims--even when compelling new evidence of innocence comes to light shortly before an execution. Under current collateral review procedures, a "full and fair judicial review" often does not include reviewing the merits of the inmate's constitutional claims.

I. FACTUAL DISCUSSION

A. Overview of State Post-Conviction Proceedings

1. The Filing of Petitions for Writ of Habeas Corpus

Any person whose liberty is being restrained by virtue of a sentence imposed against him/her by a state court of record may file a petition for writ of habeas corpus to challenge the denial of his/her rights under the United States Constitution or the Georgia Constitution.[1] Generally, the petition must be filed with the superior court in the county in which the petitioner is detained.[2] The petitioner may amend his/her petition up to 120 days after filing the original petition.[3] Unlike habeas petitions challenging other felony convictions, there is no specified time limit for filing a petition for writ of habeas corpus to challenge a conviction or sentence in cases where the death penalty has been imposed.[4]

The petition must set forth the following:

1. The proceedings in which the petitioner was convicted;
2. The date of the final judgment;
3. How the petitioner's rights were violated;
4. All possible grounds of relief;
5. The claims raised at trial and direct appeal, if taken, providing appropriate citations to the trial and appellate record; and
6. Any previous proceedings taken to secure relief from his/her conviction, including state habeas corpus petitions, and in regard to state habeas corpus petitions, all claims that were raised in the petition.[5]

The petitioner must verify the petition with his/her oath or the oath of someone acting on his/her behalf.[6] The petitioner must also attach to the petition any affidavits,[7] records, or other evidence supporting his/her allegations or explain why s/he was unable to attach the necessary documents.[8]

---

[1] O.C.G.A. §§ 9-14-41, -42(a) (2005).

[2] O.C.G.A. § 9-14-43 (2005) (noting "if the petitioner is not in the custody or is being detained under the authority of the United States, any of the several states other than Georgia, or any foreign state, the petition must be filed in the superior court of the county in which the conviction and sentence which is being challenged was imposed").

[3] GA. UNIF. SUPER. CT. R. 44.7.

[4] O.C.G.A. § 9-14-42(c) (2005) ("Any action brought pursuant to this article shall be filed . . . within four years in the case of a felony, other than one challenging a conviction for which a death sentence has been imposed or challenging a sentence of death.").

[5] O.C.G.A. §§ 9-14-44, -51 (2005).

[6] O.C.G.A. §§ 9-14-44 (2005).

[7] All affidavits must include the address and telephone number of the affiant; must be accompanied by a notice of the party's intention to introduce it into evidence; and must be served upon the opposing party at least ten days in advance of the date set for the hearing in the case. *See* O.C.G.A. § 9-14-48(c) (2005).

[8] O.C.G.A. § 9-14-44 (2005).

After the petition is filed, the state[9] will have 20 days to either file an answer to the petition or move to dismiss the petition.[10] An extension for the filing of the answer or the motion to dismiss may be granted for good cause shown.[11]

A petitioner seeking a stay of execution during the pendency of the habeas proceeding is not required to demonstrate a substantial likelihood of success on the merits to obtain a stay of execution.[12] Rather, the grant or denial of a stay of execution is within the sound discretion of the habeas court, taking into account the circumstances of each case.[13] The habeas court should balance conveniences and considerations of whether greater harm may be done by refusing than by granting the stay of execution.[14] A stay may be granted, but is not required to be granted, where a matter critical to the defendant's claims is pending in another case before the court.[15]

2. Post-Conviction Motions and Hearing on Petitions for Writ of Habeas Corpus

In all cases in which the petitioner is challenging, for the first time, state court proceedings resulting in the death penalty, the superior court clerk of the county where the petition was filed must, within ten days of the filing of the petition, serve a copy of the petition upon the Executive Director of the Council of Superior Court Judges of Georgia (the Council) thereby requesting assistance with the assignment of a judge to hear the petition.[16] Within thirty days of receipt of the copy of the petition, the President of the Council must assign the case to a judge who is not within the circuit in which the conviction or sentence was imposed.[17]

Once a judge has been assigned, s/he may schedule a preliminary conference with the state and petitioner's counsel.[18] The judge may also enter a scheduling order.[19] If the petitioner desires to file pretrial motions, s/he must do so within sixty days after the filing of the petition.[20] Similarly, the state's motions must be filed within ninety days after the filing of the petition.[21] Additionally, if discovery is authorized it must be completed

---

[9] This Section will refer to the respondent in a state habeas corpus proceeding, the prison warden, as the "state."
[10] GA. UNIF. SUPER. CT. R. 44.3.
[11] *Id.*
[12] Zant v. Dick, 294 S.E.2d 508, 509 (Ga. 1982).
[13] *Id.*
[14] *Id.*
[15] Williams v. Head, 533 S.E.2d 714, 714 (Ga. 2000) (granting a stay of execution where the issue of whether electrocution is a constitutional form of punishment is pending in another case before the Georgia Supreme Court).
[16] O.C.G.A. §§ 9-14-47.1(b), 15-1-9.1(b)(3) (2005); GA. UNIF. SUPER. CT. R. 44.2.
[17] O.C.G.A. § 9-14-47.1(b) (2005); GA. UNIF. SUPER. CT. R. 44.4(A).
[18] GA. UNIF. SUPER. CT. R. 44.5.
[19] *Id.*
[20] O.C.G.A. § 9-14-47.1(c)(3) (2005); GA. UNIF. SUPER. CT. R. 44.6.
[21] O.C.G.A. § 9-14-47.1(c)(3) (2005); GA. UNIF. SUPER. CT. R. 44.6.

within 120 days after the filing of the petition.[22] The evidentiary hearing must be conducted within 180 days of the filing of the petition.[23]

Within sixty days after the evidentiary hearing, the petitioner may file a brief in support of his/her petition,[24] and if directed by the court, s/he "shall file proposed findings of fact and conclusions of law and a proposed order."[25] Within ninety days after the evidentiary hearing, the state may file a brief in response, and, if directed by the court, the state "shall file proposed findings of fact and conclusions of law and a proposed order."[26] Within 100 days after the evidentiary hearing, the petitioner may file a reply brief.[27] The assigned judge has the discretion to shorten the time periods for various actions in a habeas corpus proceeding or lengthen these periods for "good cause."[28]

3. Decisions on Petitions for Writ of Habeas Corpus

The judge must issue a ruling on the petition and written findings of fact and conclusions of law within ninety days of the filing of the state's brief, or the petitioner's reply brief, if filed.[29] If the judge finds in favor of the petitioner, s/he must "enter an appropriate order with respect to the judgment or sentence challenged in the proceedings and such supplementary orders as to re-arraignment, retrial, custody, or discharges as may be necessary and proper."[30]

4. Appealing Decisions on Petitions for Writ of Habeas Corpus

In cases in which the petition is denied, the petitioner may appeal the decision by filing with the clerk of the Georgia Supreme Court a written application for "a certificate of probable cause to appeal" and a notice of appeal with the clerk of the relevant superior court within thirty days from entry of the order denying relief.[31] "A certificate of probable cause to appeal a final judgment in a habeas corpus case involving a criminal conviction will be issued where there is arguable merit."[32] In considering whether probable cause exists to appeal, the Georgia Supreme Court may consider the record and

---

[22] GA. UNIF. SUPER. CT. R. 44.7.

[23] O.C.G.A. § 9-14-47.1(c)(4) (2005); GA. UNIF. SUPER. CT. R. 44.9. A court reporter must transcribe the evidentiary hearing and make available copies of the transcript to the parties and the court within thirty days after the evidentiary hearing. GA. UNIF. SUPER. CT. R. 44.10.

[24] O.C.G.A. § 9-14-44 (2005); UNIF. SUPER. CT. R. 44.11.

[25] GA. UNIF. SUPER. CT. R. 44.11.

[26] *Id.*

[27] *Id.*

[28] GA. UNIF. SUPER. CT. R. 44.5.

[29] GA. UNIF. SUPER. CT. R. 44.12.

[30] O.C.G.A. § 9-14-48(d) (2005).

[31] O.C.G.A. § 9-14-52(b) (2005). It should be noted that in cases in which the petitioner is granted relief, the state may appeal without obtaining a certificate of probable cause. *See* O.C.G.A. § 9-14-52(c) (2005).

[32] GA. SUP. CT. R. 36.

transcript.[33] If the Court finds that probable cause to appeal does exist, the proper standard of review on appeal "requires that [the reviewing court] accept the habeas court's factual findings and credibility determinations unless clearly erroneous, but [the reviewing court will] independently apply the legal principles to the facts."[34] If the Court finds that probable cause does not exist to appeal, the application will be denied.

The petitioner may seek review of this denial by petitioning for a writ of *certiorari* with the United States Supreme Court.[35]

B. Procedural Restrictions on Petitions for Writ of Habeas Corpus

1. Claims Already Raised and Disposed of on Direct Appeal

Issues raised on appeal and reviewed by an appellate court will not generally be reviewed in a habeas corpus proceeding.[36] However, a barred claim would likely be allowed in a habeas corpus proceeding if a change in the law might render a challenge based on that claim successful.[37]

2. Claims That Could Have Been Timely Objected to at Trial or Raised on Direct Appeal

A failure to make a timely objection to any alleged error or deficiency at trial, or failure to pursue the same on appeal, generally will preclude review in a subsequent habeas corpus proceeding.[38] Thus, claims that could have been raised at trial or on direct appeal are procedurally defaulted for the purpose of collateral review. However, a habeas corpus court may still review "alleged constitutional errors or deficiencies if there shall be a showing of adequate cause for failure to object or to pursue on appeal *and* a showing of actual prejudice to the accused."[39] If the petitioner cannot demonstrate sufficient cause

---

[33] O.C.G.A. § 9-14-52(b) (2005) (noting that the superior court transmits to the Georgia Supreme Court the record and the transcript).

[34] West v. Waters, 533 S.E.2d 88, 90 (Ga. 2000) (citing Zant v. Means, 522 S.E.2d 449 (1999)).

[35] 28 U.S.C. § 1257(a) (2005).

[36] *See* Brown v. Ricketts, 213 S.E.2d 672, 673 (Ga. 1975) (holding that "[i]t is not the function of state habeas corpus courts to review issues already decided by an appellate court and it is not the function of [the appellate court] to review, on denial of the writ of habeas corpus, issues previously decided on appeal"); *see also* Turpin v. Christenson, 497 S.E.2d 216, 219-20 (Ga. 1998) (holding that numerous claims alleged by habeas petitioner were res judicata because "[a]fter an appellate review the same issue[s] will not be reviewed on habeas corpus); Hammock v. Zant, 253 S.E.2d 727, 728 (Ga. 1979) (citing White v. Hornsby, 12 S.E.2d 875, 876 (Ga. 1941)).

[37] *See Hammock*, 253 S.E.2d at 728 n.1 (citing Bunn v. Burden, 228 S.E.2d 830 (Ga. 1976)); *see also* Bruce v. Smith, 553 S.E.2d 808, 810 (Ga. 2001) (noting that "[w]ithout a change in the facts or the law, a habeas court will not review an issue decided on direct appeal").

[38] *See* O.C.G.A. § 9-14-48(d) (2005); Black v. Hardin, 336 S.E.2d 754, 755 (Ga. 1985).

[39] *See Black*, 336 S.E.2d at 755; *see also* O.C.G.A.§ 9-14-48(d) (2005).

and prejudice, s/he may still obtain relief in order to avoid a "miscarriage of justice" if the habeas court finds that there has been a "substantial denial of constitutional rights."[40]

a. Cause and Prejudice Exception

The "cause and prejudice" exception to an otherwise valid procedural default applies only when the habeas petitioner can demonstrate that a force external to the defense impeded his/her counsel's efforts to raise a defaulted claim at trial or on direct appeal.[41] Objective external factors that may constitute "cause" sufficient to satisfy the test "include interference by government officials that makes compliance with the procedural rules impossible or a showing that a factual or legal claim was not available to counsel."[42] Additionally, the Georgia Supreme Court has found sufficient cause for the petitioner's failure to raise the claim of jury-bailiff misconduct on appeal, where the bailiff concealed from the trial court a question posed by the jury during sentencing deliberations.[43]

A valid claim of ineffective assistance of counsel for waiving an issue at trial or on direct appeal under *Strickland v. Washington*[44] may also constitute "cause."[45] Attorney error that falls short of the *Strickland* standard for constitutional ineffectiveness does not rise to the level of "cause."[46] Furthermore, the "mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute "cause" for a procedural default."[47]

To show sufficient prejudice, the petitioner must demonstrate "actual prejudice that 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'"[48] Certain trial errors, such as juror-bailiff misconduct, have a presumption of prejudice if properly objected to at trial and raised on appeal, but a petitioner is not entitled to that presumption of prejudice to meet the "cause and prejudice test" after a claim has already been procedurally defaulted.[49] A petitioner claiming

---

[40] *Black*, 336 S.E.2d at 755.

[41] Head v. Ferrell, 554 S.E.2d 155, 160 (Ga. 2001) (citing Turpin v. Mobley, 502 S.E.2d 458, 462 (Ga. 1998)).

[42] Turpin v. Christenson, 497 S.E.2d 216, 221 (Ga. 1998).

[43] Turpin v. Todd, 493 S.E.2d 900, 907 (Ga. 1997).

[44] 466 U.S. 668 (1984).

[45] *See Ferrell*, 554 S.E.2d at 160; *Todd*, 493 S.E.2d at 906.

[46] *Christenson*, 497 S.E.2d at 221. The *Strickland* test requires the petitioner to allege deficient performance by his counsel by demonstrating that his/her counsel's performance "fell below an objective standard of reasonableness" to such a degree that, by making such serious errors, counsel was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

[47] *Christenson*, 497 S.E.2d at 221 (citing Murray v. Carrier, 477 U.S. 478, 486 (1986)).

[48] Turpin v. Mobley, 502 S.E.2d 458, 462 (Ga. 1998) (quoting *Todd*, 493 S.E.2d at 907); *Christianson*, 497 S.E.2d at 221(quoting *Todd*, 493 S.E.2d at 907); *see also* Head v. Hill, 587 S.E.2d 613, 623-24 (Ga. 2003).

[49] *See Todd*, 493 S.E.2d at 907-08 (holding that if the law presumes prejudice where juror-bailiff misconduct existed when such error is timely raised, a petitioner who is attempting to overcome a procedural bar does not have the benefit of that presumption of prejudice).

ineffective assistance of counsel in waiving a claim at trial or omitting a claim on appeal who has shown sufficient prejudice under *Strickland*[50] has also shown sufficient prejudice under the "cause and prejudice" test applied to procedurally defaulted claims.[51]

b. Miscarriage of Justice Exception

The "cause and prejudice" test is not applied to procedurally defaulted claims in habeas corpus proceedings are when granting habeas corpus relief is necessary to avoid a "miscarriage of justice"[52] or when the claims regard sentencing phase jury instructions in death penalty trials.[53]

A miscarriage of justice "is by no means to be deemed synonymous with procedural irregularity, or even with reversible error."[54] "[I]t demands a much greater substance, approaching perhaps the imprisonment of one who, not only is *not* guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry."[55]

Habeas corpus courts are authorized under the "miscarriage of justice" exception to consider for the first time claims of mental retardation because of Georgia's constitutional prohibition against executing mentally retarded persons.[56] A petitioner who brings a proper mental retardation claim under this exception in order to avoid a death sentence must prove his/her mental retardation beyond a reasonable doubt.[57]

c. Sentencing Phase Jury Instruction in a Death Penalty Case Exception

Because the sentencing charge in a death case is so crucial to the outcome of the trial, the Supreme Court of Georgia has reserved the power to review those charges in habeas proceedings, whether an objection was made in the trial court or not.[58] Thus, "[c]laims regarding sentencing phase jury [instructions] in a death penalty case are never barred by procedural default."[59]

---

[50] To meet the *Strickland* test for prejudice, a petitioner "must show that there is a reasonably probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 699.

[51] *See* Head v. Ferrell, 554 S.E.2d 155,160 (Ga. 2001) (quoting *Todd*, 493 S.E.2d at 907-08).

[52] *Id.*

[53] *See infra* notes 58-59 and accompanying text.

[54] Turpin v. Hill, 498 S.E.2d 52, 53 (Ga. 1998) (quoting Gavin v. Vasquez, 407 S.E.2d 756, 757 (Ga. 1991)).

[55] Valenzuela v. Newsome, 325 S.E.2d 370, 374 (Ga. 1985) (noting that the "miscarriage of justice" exception would apply in the case of mistaken identity); *Vasquez*, 407 S.E.2d at 757.

[56] *See Hill*, 498 S.E.2d at 53 n.2 (noting such claims shall be considered only within the context of the sentencing phase).

[57] Head v. Hill, 587 S.E.2d 613, 621 (Ga. 2003).

[58] *See* Stephens v. Hopper, 247 S.E.2d 92, 96 (Ga. 1978).

[59] Head v. Ferrell, 554 S.E.2d 155, 160 (Ga. 2001).

d. Ineffective Assistance of Counsel Exception

Claims of ineffective assistance of counsel must be raised at the first possible post-conviction opportunity.[60] A habeas corpus petitioner's claim of ineffective assistance of trial counsel is not subject to procedural default when it is raised for the first time in a habeas proceeding where the petitioner was represented by the same trial counsel throughout the direct appeal proceedings.[61] Similarly, claims of ineffective assistance of appellate counsel, which cannot be raised on direct appeal, are not defaulted in subsequent habeas corpus proceedings.[62] Where, however, the defendant receives new counsel for his/her motion for new trial, amended motion for new trial, or his/her direct appeal and fails to raise the claim of ineffective assistance of trial counsel in those proceedings, such claims are procedurally defaulted for purposes of habeas review.[63]

3. Successive Petitions

a. Claims Already Raised in the Initial Petition

Petitioners may not relitigate claims on a second petition which have already been decided against them in an initial petition.[64]

b. New Claims Not Raised in the Initial Petition

Petitioners are not entitled to relief on claims that could have been raised in their first petition.[65] Specifically, any grounds of relief not raised by the petitioner in his/her

---

[60] Turpin v. Christenson, 497 S.E.2d 216, 222 (Ga. 1998).

[61] *See* Turpin v. Mobley, 502 S.E.2d 458, 462 (Ga. 1998); Turpin v. Todd, 493 S.E.2d 900, 910 (Ga. 1997) (noting that an attorney can not raise a claim of ineffectiveness against himself).

[62] Miliken v. Steward, 583 S.E.2d 30, 31 (Ga. 2003).

[63] *Cf.* Thompson v. State, 359 S.E.2d 664, 665 (Ga. 1987) (holding that where trial counsel files motion for new trial but new counsel files amended motion without raising claim of ineffectiveness of trial counsel, that claim will be waived if raised for the first time on appeal).

[64] Smith v. Zant, 301 S.E.2d 32, 34-35 (Ga. 1983) (holding that because the petitioner raised in a previous habeas petition, and the courts rejected, the claim that the Georgia death penalty statute was being "applied arbitrarily and discriminatorily," it is not cognizable in a successive habeas petition); Samuels v. Hopper, 215 S.E.2d 250, 251 (Ga. 1975) (holding that questions raised and decided against the petitioner in a previous habeas proceeding will not be decided again in a subsequent habeas proceeding); Williams v. Lawrence, 18 S.E.2d 463, 463 (Ga. 1942) (holding that the petitioner is precluded from maintaining another petition for habeas corpus on a same ground raised and rejected in a previous petition); *see also* Stevens v. Kemp, 327 S.E.2d 185, 187 (Ga. 1985) (holding that the argument that the petitioner was denied a full and fair hearing on a particular claim in the initial habeas proceeding, does not allow him to relitigate that initial claim in a successive petition, where he could have raised this complaint in his application for certificate of probable cause to appeal the denial of his first petition).

[65] *See, e.g.*, Tucker v. Kemp, 351 S.E.2d 196, 198-99 (Ga. 1987) (rejecting contention that United States Supreme Court opinion decided after first habeas petition was tantamount to a change in the law to allow a new claim based on that case which was not raised in the first petition; additionally holding that petitioner could have raised this claim in his first petition); *Smith*, 301 S.E.2d at 33-34 (upholding refusal to hear

original or amended petition are considered waived unless (1) otherwise allowed by the United States Constitution or the Georgia Constitution or (2) the judge presiding over a subsequent petition finds that the grounds asserted "could not reasonably have been raised in the original or amended petition."[66]

If the petitioner cannot demonstrate that his/her new claims are constitutionally non-waivable,[67] s/he must show that these claims "could not reasonably have been raised in the earlier petition."[68] For example, where the petitioner's first habeas attorney would not raise several constitutional issues in the first habeas corpus petition, despite the petitioner's request to do so and assurances to the contrary, the petitioner was allowed to proceed on the merits of those claims in his second petition.[69]

Additionally, a second habeas petition may be heard where the claims therein are based on a change in the law subsequent to the petitioner's first petition because the habeas petitioner could not reasonably have raised such claims in his/her first petition.[70] Furthermore, because a petitioner could not reasonably have raised claims in his/her first habeas petition that were raised and decided against him/her on direct appeal, changes in the law subsequent to a petitioner's first petition will relieve the petitioner from that procedural bar and allow these claims to be raised in a second habeas petition.[71]

4. Substantive Claims Not Cognizable in a Habeas Proceeding

A number of substantive claims are not cognizable in a habeas corpus proceeding.[72] A petitioner may not challenge the sufficiency of the evidence used to convict him/her at

---

claim challenging gender makeup of jury panel, where claim was not raised either before trial or in first habeas petition, and petitioner made no claim in either petition that his trial or habeas counsel was ineffective); Dix v. Zant, 294 S.E.2d 527, 528 (Ga. 1982) (holding that second petition with claims of ineffective assistance of trial counsel was barred because the claims therein could have been raised in the first petition and the petitioner had the same counsel on both the first and second petitions); Jarrell v. Zant, 284 S.E.2d 17, 17 (Ga. 1981) (noting that many of the errors raised in the second habeas petition were barred because the could have been raised in his first habeas petition).

[66] O.C.G.A. § 9-14-51 (2005).

[67] An exhaustive review of Georgia case law did not reveal any cases providing examples of "constitutionally non-waivable" claims.

[68] *Smith*, 301 S.E.2d at 34; *see also* Fuller v. Ricketts, 214 S.E.2d 541, 542 (Ga. 1975).

[69] *See* Smith v. Garner, 222 S.E.2d 351, 354 (Ga. 1976).

[70] *See* Bruce v. Smith, 553 S.E.2d 808, 810-11 (Ga. 2001); *see also Jarrell*, 284 S.E.2d at 17 n.1 (noting that because the cases relied upon by the petitioner as the basis for his new claims in his successive petition were decided after the hearing for his first habeas petition, the new claims are not barred because he could not have reasonably raised these claims in his first petition).

[71] *See Bruce*, 553 S.E.2d at 810; *see also* Stevens v. Kemp, 327 S.E.2d 185, 187 (holding that "the rule of res judicata in habeas corpus proceedings is rendered inapplicable where the grounds for relief are based on a change in the law occurring subsequent to the prior habeas proceeding").

[72] *See, e.g.*, Johnson v. Griffin, 540 S.E.2d 189, 190 (Ga. 2001) (holding that challenges to a determination of a parole board that a petitioner is no longer eligible for parole do not involve a petitioner's sentence or incarceration and, thus, are not cognizable in a habeas corpus proceeding).

trial,[73] as these claims must be raised on direct appeal.[74] Claims of newly discovered evidence are not appropriate in a habeas proceeding,[75] as these claims must be raised in an extraordinary motion for new trial.[76]

C. Review of Error

For errors involving a petitioner's constitutional rights, the petitioner is entitled to a new trial unless the habeas court finds that "the error is harmless beyond a reasonable doubt."[77] The determination of whether an error is harmless must be made "on a case by case basis, taking into consideration the facts, the trial context of the error, and the prejudice created thereby as juxtaposed against the strength of the evidence of thre defendant's guilt."[78] In petitions where the asserted error is proper for review in a habeas corpus proceeding, non-constitutional error will be harmless if it is "highly probable that the error did not contribute to the judgment."[79]

D. Retroactivity of Rules

A new rule of criminal procedure "applies only to those cases on direct review or not yet final, and would not apply to cases on collateral review," such as a habeas corpus petition.[80] However, "watershed rules concerning procedures that are implicit in the concept of ordered liberty and that implicate the fundamental fairness and accuracy of the criminal proceeding" are applied retroactively on collateral review.[81] Furthermore, "a new rule of substantive criminal law must be applied retroactively to cases on collateral review."[82] For example, appellate decisions that interpret an element of a criminal offense in a manner that renders certain conduct outside of the prohibitive scope of the statute are rulings of substantive law and, thus, may be retroactively applied to those who were previously convicted of that same conduct under the statute.[83]

---

[73] Stephens v. Balkcom, 265 S.E.2d 596, 597 (Ga. 1980).
[74] *Id.*
[75] Bush v. Chappell, 171 S.E.2d 128, 130 (Ga. 1969) (citing Evans v. Perkins, 165 S.E.2d 652 (Ga. 1969)).
[76] *Id.*
[77] *See* Brewer v. Hall, 603 S.E.2d 244, 247 (Ga. 2004).
[78] *Id.* (quoting Hill v. State, 295 S.E.2d 518 (1982)).
[79] *See* Johnson v. State, 230 S.E.2d 869, 870 (Ga. 1976).
[80] Luke v. Battle, 565 S.E.2d 816, 817 (Ga. 2002); *see also* Harris v. State, 543 S.E.2d 716, 717-18 (Ga. 2001) (holding that error in charging jury in malice murder trial that it could infer intent to kill from use of deadly weapon was only retroactive to cases on direct appeal or not yet final).
[81] Head v. Hill, 587 S.E.2d 613, 619 (Ga. 2003).
[82] *Luke*, 565 S.E.2d at 819.
[83] *Id.* at 819-20 (discussing how the term "force" in the aggravated sodomy statute no longer allows for the conviction of those who commit acts of sodomy against an underage victim, without more, thus, placing non-forceful acts of sodomy outside the reach of the statute); *see also* Scott v. Hernandez-Cuevas, 396 S.E.2d 900, 900 (Ga. 1990) (holding a prior court decision that evidence of constructive possession is insufficient to convict defendant of trafficking in cocaine was retroactive).

II. ANALYSIS

A. Recommendation #1

All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.

The Georgia Uniform Superior Court Rules contain certain rules that seem to permit the adequate development and judicial consideration of claims.[84] Specifically, because the capital petitioner has no deadline for filing his/her habeas corpus petition and has an additional 120 days after filing to amend his/her petition,[85] it appears that the petitioner receives adequate time to formulate and properly raise all known claims. Furthermore, a judge who is not within the circuit in which the conviction and sentence were imposed must be assigned to the case,[86] which aims to alleviate any potential bias in the habeas proceedings stemming from the habeas judge presiding over a challenge to a conviction and/or sentence over which s/he originally presided.

Once a judge has been assigned, s/he may schedule a preliminary conference with the state and defense counsel and enter a scheduling order.[87] This conference is intended to facilitate the efficient administration of the proceeding and provides the framework for the development of the asserted claims through discovery and motions. Furthermore, if the petition is not summarily dismissed as procedurally barred, the court must hold an evidentiary hearing within 180 days of the filing of the petition.[88]

However, certain aspects of Georgia law may preclude the adequate development and judicial consideration of all claims. For example, Georgia law (1) does not require an automatic stay of execution upon filing of a habeas corpus petition, (2) allows the habeas judge, after requesting that either party file proposed findings of fact and conclusions of law, to copy verbatim a party's proposed findings and conclusions in the final order of the court, and (3) allows the habeas judge to shorten any of the time periods for various actions in a habeas corpus proceeding.

---

[84] GA. UNIF. SUPER. CT. R. 44.1-.12.

[85] GA. UNIF. SUPER. CT. R. 44.7; O.C.G.A. § 9-14-42(c) (2005) ("Any action brought pursuant to this article shall be filed . . . within four years in the case of a felony, other than once challenging a conviction for which a death sentence has been imposed or challenging a sentence of death.").

[86] O.C.G.A. § 9-14-47.1(b) (2005); GA. UNIF. SUPER. CT. R. 44.4(A).

[87] GA. UNIF. SUPER. CT. R. 44.5.

[88] O.C.G.A. § 9-14-47.1(c)(4) (2005); GA. UNIF. SUPER. CT. R. 44.9.

The grant or denial of a stay of execution is within the sound discretion of the habeas court, taking into consideration the circumstances of each case.[89] A stay of execution is not required to be granted even where a matter critical to the defendant's claims is pending in another case before the court.[90] It appears, however, that Georgia habeas courts generally grant a stay of execution upon the filing of a habeas petition and a contemporaneous motion for stay of execution (which is then usually dissolved upon an affirmance of the denial of the habeas petition).[91] In sum, although the habeas courts generally grant stays of execution, habeas courts are not required to do so.

Furthermore, the Georgia Supreme Court has allowed the habeas court's verbatim adoption of the state's proposed findings of fact and conclusions of law in its final order.[92] Specifically, the Georgia Supreme Court noted that although such practice is not preferable, "even when the [habeas] judge adopts the proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous."[93] While habeas judges rightly have the discretion[94] to request proposed findings of fact and conclusions of law from either party, the wholesale adoption or copying of the state's findings of fact and conclusions of law in the habeas court's order undermines a habeas judge's necessary duty to exercise independent judgment in deciding cases and to carefully consider the evidence and applicable law before rendering findings of fact and conclusions of law in the written order. The problem with copying the state's proposed findings and conclusions is even more acute in a habeas proceeding where the inmate is not entitled to appointed counsel.[95]

Additionally, the assigned judge has the discretion to shorten the time periods for various actions in a habeas corpus proceeding,[96] which allows the habeas court to curtail the time for filing motions, pursuing discovery, and filing briefs. This potentially inhibits the full development of a record upon which the habeas court may make its decision on the merits of the petitioner's claims.

Although the State of Georgia provides a framework for the development and administration of a petitioner's claims and mandates an evidentiary hearing on those claims, habeas courts retain the discretion to determine scope of development and judicial consideration given to any claim. We were unable to ascertain with certainty whether Georgia habeas courts exercise this discretion to (1) expedite post-conviction proceedings

---

[89] Zant v. Dick, 294 S.E.2d 508, 509 (Ga. 1982).

[90] *See* Williams v. Head, 533 S.E.2d 714, 714 (Ga. 2000) (granting a stay of execution where the issue of whether electrocution is a constitutional form of punishment is pending in another case before the Georgia Supreme Court).

[91] *See, e.g.*, Corn v. Hopper, 257 S.E.2d 533, 535 (Ga. 1979) (affirming the trial court's denial of the habeas petition and dissolving the previously granted stay of execution).

[92] *See* Jefferson v. Zant, 431 S.E.2d 110, 111-12 (Ga. 1993).

[93] *Id.* at 112 (citing Anderson v. Bessemer City, 470 U.S. 564, 572 (1985)).

[94] *See* GA. UNIF. SUPER. CT. R. 44.11.

[95] *See infra* notes 112-117 and accompanying text.

[96] GA. UNIF. SUPER. CT. R. 44.5.

unfairly, (2) if necessary, stay executions to permit full and deliberate consideration of claims, and (3) use independent judgment in deciding cases when making findings of fact and conclusions of law, even though habeas courts may make verbatim adoptions of a party's proposed findings and conclusions.

Thus, we are unable to conclude whether the State of Georgia complies with the requirements of Recommendation #1.

B. Recommendation #2

The State should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.

Recommendation #3

Judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

Georgia law provides that the court "*may* receive proof by depositions, oral testimony, sworn affidavits, or other evidence," but that "[n]o other forms of discovery shall be allowed except upon leave of court and a showing of exceptional circumstances."[97] If the habeas court allows any discovery by the parties, it must be completed within 120 days of the filing of the habeas petition,[98] or within a shorter or longer time period as designated by the habeas judge.[99] A habeas court's decision on discovery matters will not be reversed by a reviewing court in the absence of a clear abuse of discretion.[100]

These rules leave to the discretion of the habeas judge the decision to allow discovery and to determine the scope of and time limit for such discovery if it is allowed. Thus, a habeas judge can not only exercise his/her discretion to prevent "full discovery" of all evidence necessary for the petitioner to argue his/her claims, s/he can prevent any and all discovery. Only if the habeas court first exercises its discretion to allow the petitioner to receive the benefit of discovery is the petitioner provided with the time for discovery, 120 days. This time period, however, can be shortened by the habeas judge.

Given that these provisions grant the trial court considerable discretion in determining the scope and length of discovery, we were unable to ascertain with any certainty whether all Georgia habeas courts exercise this discretion to both provide sufficient time for discovery and scope of discovery in a manner that ensures full discovery.

---

[97] O.C.G.A. § 9-14-48(a) (2005) (emphasis added).
[98] GA. UNIF. SUPER. CT. R. 44.7.
[99] GA. UNIF. SUPER. CT. R. 44.5.
[100] Turpin v. Bennett, 513 S.E.2d 478, 483 (Ga. 1999) (holding that the habeas court did not abuse its discretion in refusing to permit discovery of a doctor's medical records).

Thus, we are unable to conclude whether the State of Georgia complies with the requirements of Recommendations #2 and 3.

C. Recommendation #4

When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.

The Georgia Supreme Court maintains exclusive jurisdiction over appeals from judgments in habeas corpus proceedings.[101] There is no appeal of right of a denial of a habeas corpus petition, and a petitioner must first file a certificate of probable cause to appeal with the Georgia Supreme Court.[102] Thus, in order for the Georgia Supreme Court to fully address the issues of fact and law raised by the petitioner on appeal and to issue an opinion that fully explains the bases for disposition of those claims, the petitioner must first file a certificate of probable cause to appeal and it must be accepted by the Georgia Supreme Court.

Even if the certificate of probable cause to appeal is accepted, the Georgia Supreme Court is not required to issue a written opinion.[103] The Georgia Supreme Court may issue an affirmance without opinion in any civil case when it "determines one or more of the following circumstances exist and is dispositive of the appeal":

(1) The evidence supports the judgment;
(2) No harmful error of law, properly raised and requiring reversal appears; or
(3) The judgment of the court below adequately explains the decision and an opinion would have no precedential value.[104]

Because "a habeas corpus proceeding is a collateral, civil action,"[105] the Georgia Supreme Court may issue affirmances that do not apprise the parties of the basis for the disposition where the evidence supports the judgment, no harmful error exists, or the judgment of the court below adequately explains the decision. In fact, the Georgia Supreme Court has issued such affirmances without opinion in habeas corpus appeals, albeit in non-death cases.[106]

Thus, the State of Georgia fails to meet the requirements of Recommendation #4 because the Georgia Supreme Court is not required in habeas cases where a death sentence has

---

[101] GA. CONST. art. VI, § 6, para. 3.
[102] O.C.G.A. § 9-14-52(b) (2005).
[103] *See* GA. SUP. CT. R. 59.
[104] *Id.*
[105] Fortson v. State, 532 S.E.2d 102, 104 (Ga. 2000).
[106] *See, e.g.*, State v. Colack, 541 S.E.2d 374 (Ga. 2001); Dennis v. State, 312 S.E.2d 118 (Ga. 1984); Ramsey v. Dodd, 277 S.E.2d 913 (Ga. 1981).

been imposed to issue opinions that fully explain the bases for the disposition of the asserted claims.

D. Recommendation #5

On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.

Recommendation #6

When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.

The Georgia Supreme Court uses the "cause and prejudice" standard for waiver of claims. The "cause and prejudice" standard for overcoming procedural default applies to both constitutional and state law errors,[107] and will overcome an otherwise valid procedural default only when the habeas petitioner can demonstrate that (1) "some factor external to the defense impeded [his/her] counsel's efforts to raise the claim at trial or on direct appeal,"[108] and (2) "actual prejudice that 'worked to his[/her] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'"[109]

Applying the "cause and prejudice" standard for overcoming an otherwise valid procedural default allows for the waiver of potentially viable claims of constitutional or state law error without the defendant's "knowing, understanding, and voluntary" waiver of those claims. For example, under the "knowing, understanding, and voluntary" standard, where counsel, without the defendant's knowledge or voluntary consent, fails to object to an error at trial or to raise the claim on appeal, the claim would not be defaulted for the purposes of habeas review. However under the "cause and prejudice" standard used in Georgia, attorney error that falls short of the *Strickland* standard for constitutional ineffectiveness does not rise to the level of "cause."[110]

---

[107] Head v. Ferrell, 554 S.E.2d 155, 160 (Ga. 2001); Valenzuela v. Newsome, 325 S.E.2d 370, 373 (Ga. 1985).

[108] *Ferrell*, 554 S.E.2d at 160.

[109] Turpin v. Mobley, 502 S.E.2d 458, 462 (Ga. 1998) (quoting Turpin v. Todd, 493 S.E.2d 900, 907 (Ga. 1997)); Turpin v. Christianson, 497 S.E.2d 216, 221 (Ga. 1998) (quoting *Todd*, 493 S.E.2d at 907); *see also* Head v. Hill, 587 S.E.2d 613, 623-24 (Ga. 2003).

[110] *Christenson*, 497 S.E.2d at 221. The *Strickland* test requires the petitioner to allege deficient performance by his counsel by demonstrating that his/her counsel's performance "fell below an objective standard of reasonableness" to such a degree that, by making such serious errors, counsel was "not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

Furthermore, Georgia does not apply "plain error" review in habeas proceedings. Rather, "plain error" review is only applied by the appellate courts on direct appeal.[111]

Because the State of Georgia does not apply the "knowing, understanding, and voluntary" standard for constitutional error not properly preserved at trial or raised on appeal or plain error review for errors of state law in a habeas corpus proceeding, it fails to meet the requirements of Recommendations #5 and #6.

E. Recommendation #7

The state should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.

Recommendation #8

For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.

The State of Georgia has not established post-conviction defense organizations to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings. In fact, the Georgia Supreme Court has found that death-sentenced inmates do not have a right to appointed counsel or funds for investigators or experts after direct review by the Georgia Supreme Court.[112] Indigent death-sentenced inmates are, therefore, left to represent themselves or obtain pro bono attorneys, who are not required by the State of Georgia to possess any specific qualifications to handle state post-conviction cases. Based on this information, the State of Georgia is not in compliance with Recommendations #7 and 8.

We note that there are a number of individuals and organizations that provide pro bono representation to death-sentenced inmates during state post-conviction proceedings. For example, the Georgia Appellate Practice and Educational Resource Center (Resource Center), which receives limited state funding,[113] represents inmates petitioning for state habeas and provides resource assistance in state habeas cases.[114] However, the Resource Center's staff is composed of only four attorneys, who at any given time serve as co-

---

[111] Paul v. State, 537 S.E.2d 58, 61 (Ga. 2000) (quoting Almond v. State, 349 S.E.2d 482, 486 (Ga. Ct. App. 1986)).

[112] *See* O.C.G.A. §§ 17-12-121, -127(c) (2005); Gibson v. Turpin, 513 S.E.2d 186, 188 (Ga. 1999); State v. Davis, 269 S.E.2d 461, 462-63 (Ga. 1980).

[113] The Resource Center receives approximately $800,000 per year. *See* Interview with a Staff Member from the Resource Center (May 2005) (on file with author).

[114] *Id.*

counsel or provide substantial assistance in approximately sixty pending state habeas cases.[115] Due to the limited resources of these organizations, it impossible for them to provide representation for all indigent death-sentenced inmates, leaving some without representation.[116]

F. Recommendation #9

> **State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.**

Habeas courts in Georgia give full retroactive effect to changes in the law announced by the U.S. Supreme Court in limited circumstances. Specifically, habeas courts will only give retroactive effect to new rules of substantive criminal law and new rules of procedural law that are necessary to ensure the fundamental fairness and accuracy of a criminal trial.[117] All other new rules of procedural law, including those announced by the U.S. Supreme Court, will be applied retroactively only to cases still within the direct appeal pipeline.[118]

Because Georgia law only gives retroactive effect to changes in the law announced by the U.S. Supreme Court in limited circumstances, the State of Georgia only partially meets the requirements of Recommendation #9.

G. Recommendation #10

> **State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.**

Georgia law does permit successive habeas corpus petitions in the limited instances where some deficiency by counsel[119] or an intervening court decision that changed the law subsequent to the first petition resulted in a meritorious claim not being raised and litigated in the first petition.[120]

---

[115] *Id.*

[116] *See* Bill Rankin, *Prisoners on Death Row Face Appeals Alone*, ATLANTA J. CONST., Jan. 18, 2005 (stating as of January 18, 2005, "[s]even of Georgia's death row inmates in their final rounds of appeals have no lawyer to represent them, the highest number in more than a decade").

[117] Head v. Hill, 587 S.E.2d 613, 619 (Ga. 2003); Luke v. Battle, 565 S.E.2d 816, 819-20 (Ga. 2002).

[118] *Luke*, 565 S.E.2d at 817-20.

[119] *See* Smith v. Garner, 222 S.E.2d 351, 354 (Ga. 1976).

[120] *See* Bruce v. Smith, 553 S.E.2d 808, 810-11 (Ga. 2001); *see also* Jarrell v. Zant, 284 S.E.2d 17, 17 n.1 (Ga. 1981).

It would appear, however, that in cases where a change in the law subsequent to a first habeas petition extinguishes the bar against filing a claim pursuant to that change in the law in a second habeas petition, the retroactivity rules discussed in Recommendation #9 must be followed in considering the revived claim. Thus, even if a change in the law allows a petitioner to overcome the statutory bar against successive habeas petitions, the new law must be a rule of substantive criminal law or a new rule of procedural law that is necessary to ensure the fundamental fairness and accuracy of a criminal trial in order to be applied to the petitioner's case on collateral review.[121]

Although Georgia law allows for second habeas petitions where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, claims raised in a second petition pursuant to intervening court decisions still may be barred due to the application of stringent retroactivity rules. The State of Georgia, therefore, only partially meets the requirements of Recommendation #10.

H. Recommendation #11

In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U. S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

In *Chapman v. California*, the United States Supreme Court stated that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[122] The burden to show that the error was harmless falls on the "beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."[123] Georgia courts follow this pronouncement in *Chapman* by requiring the same burden of proof for errors involving a petitioner's constitutional rights—the petitioner is entitled to a new trial unless the habeas court finds that the error is harmless beyond a reasonable doubt.[124] The State of Georgia, therefore, meets Recommendation #11.

I. Recommendation #12

During the course of a moratorium, a "blue ribbon" commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.

---

[121] *See, e.g.*, *Bruce*, 553 S.E.2d at 809 (allowing a claim in a successive petition based on intervening case law, which reinterpreted an element of the defendant's affirmative defense, without discussing the application of the principles of retroactivity).

[122] 386 U.S. 18, 24 (1967).

[123] *Id.*

[124] *See* Brewer v. Hall, 603 S.E.2d 244, 247 (Ga. 2004); Rowe v. State, 582 S.E.2d 119, 124 (Ga. 2003).

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to the State of Georgia at this time.

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE

Under a state's constitution or clemency statute, the governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual; and (2) whether a person should be put to death. This process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy, and not by political considerations.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiencies. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death-row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."[1]

Since 1972, when the U.S. Supreme Court temporarily barred the death penalty as unconstitutional, clemency has been granted in substantially fewer death penalty cases. From 1976, when the Court authorized states to reinstate capital punishment, through November 2005, clemency has been granted on humanitarian grounds 229 times in 19 of the 38 death penalty states and the federal government.[2] One hundred sixty seven of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the State's only opportunity to prevent miscarriages of justice, even in cases

---

[1] Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

[2] *See* Death Penalty Information Center, Clemency, *at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13 (last visited on November 9, 2005).

involving actual innocence. A clemency decision maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision making. Yet as the capital punishment process currently functions, meaningful review frequently is not obtained and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION

A. Clemency Decision Makers-Georgia's Board of Pardons and Paroles

1. Authority of the State Board of Pardons and Paroles

Georgia's Board of Pardons and Paroles (the Board), created by Constitutional Amendment in 1943,[3] possesses the authority to grant executive clemency, including reprieves, pardons,[4] and commutations of sentences.[5] The Governor of Georgia has the authority to determine the composition of the Board[6] and the salary of its members,[7] and his/her Attorney General serves as the legal advisor to the Board.[8] Although the Governor controls the composition of and legal advice to the Board, s/he has no direct authority to grant or deny pardons or to commute death sentences.[9] Rather, the Board members possess the sole authority to grant or deny pardons or commutations[10] and no branch of the government may "usurp or substitute its functions for the functions" of the Board.[11]

2. Appointment to the Board and Position Restrictions

The Board is composed of five Governor-appointed members,[12] including the Chair of the Board, who is selected each year by the other members of the Board.[13] All individuals who are qualified to hold public office may be eligible for service on the Board.[14] Those selected to serve on the Board will be appointed for renewable seven-year full-time terms that are subject to Senate confirmation.[15] The Governor may make additional appointments to the Board as vacancies arise.[16]

---

[3] GA. CONST. art. IV, § 2, para. 2; *see* Board of Pardons and Paroles, History of Parole in Georgia, *at* http://www.pap.state.ga.us/history_of_parole.htm (last visited on Aug. 18, 2005).

[4] Rule 475-3-.10(3) of the Rules of State Board of Pardons and Paroles defines "pardon" as "a declaration that a person is relieved from the legal consequences of a particular conviction. It restores civil and political rights and removes all legal disabilities resulting from the conviction." *See* GA. COMP. R. & REGS. 475-3-.10(3) (2004).

[5] GA. CONST. art. IV, § 2, para. 2(a).

[6] O.C.G.A. § 42-9-2 (2004). The Governor's authority to select members is only subject to Senate approval. *Id.*

[7] O.C.G.A. § 42-9-5 (2004).

[8] O.C.G.A. § 42-9-10 (2004).

[9] O.C.G.A. § 42-9-56 (2004).

[10] GA. CONST. art. IV, § 2, para. 2(a).

[11] O.C.G.A. § 42-9-1 (2004).

[12] O.C.G.A. § 42-9-2 (2004).

[13] O.C.G.A. § 42-9-6(a) (2004).

[14] McLendon v. Everett, 55 S.E.2d 119, 121 (Ga. 1949).

[15] GA. CONST. art. IV, § 2, para. 1; O.C.G.A. §§ 42-9-2, -4 (2004); GA. COMP. R. & REGS. 475-1-.01 (2004). The current Board consists of the following members: Board Chairman Milton E. Nix, Jr., former Director of the Georgia Bureau of Investigation; Garfield Hammonds, former DEA Special Agent in charge of Southeast Region; Garland R. Hunt, lawyer, consulting company owner, pastor and counselor; L. Gale Buckner, former Executive Director of the Criminal Justice Coordinating Council in the Office of the

Once appointed, Board members are required to "devote their full time and energies" to their position.[17] They are prohibited from engaging in any business or profession, or holding any public office that conflicts with their official duties on the Board.[18] Board members specifically are barred from serving as a representative of any political party, executive committee, or other governing body, or as an executive officer or employee of any political committee, organization, or association.[19] Board members who wish to run for public office or solicit votes on behalf of a candidate for public office must resign from their positions before doing so.[20]

3. Duties of the Board

It is the duty of the Board "to study the cases of those inmates whom the Board has power to consider so as to determine their ultimate fitness for such relief as the Board has power to grant."[21] In order to study these cases, the Board must "obtain" as much information as possible about the inmates.[22] This information must be "obtained as soon as possible after the imposition of the sentence" and includes the following:

1. A statement of the crime for which the inmate is sentenced, the circumstances of the crime, and the inmate's sentence;
2. The name of the court in which the inmate was sentenced;
3. The term of his/her sentence;
4. The name of the presiding judge, the prosecutors, the investigating officers, and defense counsel,
5. A copy of the presentence investigation and any previous court record;
6. A fingerprint record;
7. A copy of all probation reports that may have been made; and
8. Any social, physical, mental or criminal record of the person.[23]

Additionally, the Board must maintain a written record of every person who contacted any member of the Board on behalf of an inmate.[24] The record must include the name

---

Governor; and Dr. Eugene Walker, former Commissioner of the Department of Juvenile Justice. *See* Board of Pardons and Paroles, Current Georgia Parole Board Members, *at* http://www.pap.state.ga.us/current_members.htm (last visited on Aug. 18, 2005).

[16] GA. CONST. art. IV, § 2, para. 1; *see* Partain v. Maddox, 182 S.E.2d 450, 456 (Ga. 1971).

[17] O.C.G.A. § 42-9-5 (2004).

[18] O.C.G.A. § 42-9-15(a) (2004).

[19] *Id.*

[20] *Id.*

[21] O.C.G.A § 42-9-20 (2004).

[22] O.C.G.A § 42-9-41(a) (2004).

[23] O.C.G.A § 42-9-41(a)(1)-(8) (2004).

[24] O.C.G.A § 42-9-18 (2004).

and address of each caller and his/her reason for contacting the Board member.[25] A copy of the written record must be placed in the inmate's file.[26]

The Board also must submit a written report of its activities to the Governor, Attorney General, and each chamber of the General Assembly prior to Jan. 1 of each year.[27] A copy of the report is made a permanent record of the Board.[28]

B. Clemency Petitions

To initiate the clemency process, an inmate sentenced to death may apply for a pardon and/or a commutation of his/her sentence. An inmate seeking a pardon and/or a commutation is not entitled to appointed counsel;[29] however, s/he may have a privately obtained attorney represent him/her throughout the clemency process. "Only duly licensed attorneys who are active members in good standing of the State Bar of Georgia . . . [are] permitted to appear or practice in any matter before the board for a fee, money, or other remuneration."[30]

1. Pardons

To apply for a pardon, the inmate must submit a request for a pardon in any written form, such as the "Application for Restoration of Rights/Pardons."[31] The Board may grant a pardon in two instances: (1) the inmate has completed his/her "full sentence"[32] and has thereafter "completed five years without any criminal involvement";[33] or (2) the inmate can prove "to the Board's satisfaction"[34] that s/he was innocent of the crime for which

---

[25] *Id.*
[26] *Id.*
[27] O.C.G.A. § 42-9-19 (2004).
[28] *Id.*
[29] GA. COMP. R. & REGS. 475-3-.02(2) (2004).
[30] O.C.G.A § 42-9-16(a) (2004); *see also* GA. COMP. R. & REGS. 475-3-.02(3) (2004); Board of Pardons and Paroles, Other Forms of Clemency, *at* http://www.pap.state.ga.us/other_forms_clemency.htm (last visited on Aug. 18, 2005).
[31] GA. COMP. R. & REGS. 475-3-.10(3)(a)-(b) (2004), *see also* Board of Pardons and Paroles, Application for Restoration of Rights/Pardon, *at* http://www.pap.state.ga.us/Pardon_Application.pdf (last visited on Aug. 18, 2005). The application requires the inmate to disclose all convictions as well as the length of the sentence, any probation or suspension of sentence, and/or any fine or restitution. *Id.*
[32] "Full sentence" includes serving any probationary portion of a sentence and paying any fine. *See* GA. COMP. R. & REGS. 475-3-.10(3)(b) (2004).
[33] *See* GA. COMP. R. & REGS. 475-3-.10(3)(b) (2004) (indicating that the "five-year" waiting period might be waived in certain circumstances); GA. COMP. R. & REGS. 475-3-.10(3)(a) (2004). For a discussion on the types of factors that may be considered when reviewing a petition for a pardon, also see *infra* note 47 and accompanying text.
[34] *See* Board of Pardons and Paroles, Other Forms of Clemency, *at* http://www.pap.state.ga.us/other_forms_clemency.htm (last visited on Aug. 18, 2005).

s/he was convicted or that s/he previously was determined to be innocent of the crime.[35] Newly available evidence proving the inmate's innocence may be the basis for granting a pardon.[36]

The inmate also may apply for a commutation of his/her death sentence.

2. Commutations of Death Sentences

To apply for a commutation of a death sentence, the inmate must submit a written request, in any form, identifying and explaining the grounds on which the request for commutation is based.[37] Supporting documents are neither prohibited nor required.[38] After the application for a commutation has been filed, but "prior to the end of court appeals," the Board should obtain information, if it has not already done so, concerning the circumstances surrounding the inmate's offense and criminal history.[39]

Based on this information, the Board will assess whether it should consider the case for a commutation.[40] The Board, however, is required to consider and act only upon death-row inmates' *initial* petitions for commutation.[41] All subsequent petitions for commutation are considered and acted upon only at the Board's discretion.[42]

The Board's decision as to whether it will consider the case for commutation must be made after "it appears that all appeals through the courts have ceased or been exhausted or anytime within 72 hours of the earliest time the execution could take place even if court action is still pending."[43]

C. Clemency Decision Making Process

1. Scope of Review for Petitions for Pardons and Commutations

When considering a petition for a pardon, the Board is not required to conduct any specific type of review. If the Board, however, decides to consider a case for commutation, it must conduct a "complete and fair review" of the case to assess whether a commutation is warranted.[44] In cases in which the Board decides to consider the case,

---

[35] GA. COMP. R. & REGS. 475-3-.10(3)(a) (2004); *see* O.C.G.A § 42-9-39(d) (2004) (stating that the Board can pardon any person convicted of a crime who is subsequently determined to be innocent of that crime).
[36] GA. COMP. R. & REGS. 475-3-.10(3)(a) (2004).
[37] *Id.*; O.C.G.A § 42-9-20 (2004) (stating that the Board possess the authority to commute a death sentence to life imprisonment).
[38] GA. COMP. R. & REGS. 475-3-.10(2)(b) (2004).
[39] *Id.*
[40] *Id*.
[41] McLendon v. Everett, 55 S.E.2d 119, 123 (Ga. 1949).
[42] *Id*.
[43] GA. COMP. R. & REGS. 475-3-.10(2)(b) (2004).
[44] *See* GA. COMP. R. & REGS. 475-3-.10(2)(b) (2004).

but there is insufficient time to conduct a "complete and fair review" of the case, the Board may suspend the inmate's execution for a period of time not to exceed ninety days in order to complete the required review.[45]

2. Types of Information Reviewed When Considering Petitions for Pardons and Commutations

When reviewing the inmate's case and assessing whether a pardon or commutation is warranted, the Board may consider the information it obtained pertaining to the inmate's criminal history and offense[46] and it must "cause to be brought before it" the following information:

1. The conduct of the inmate while in prison;
2. The results of any physical or mental examinations;
3. The extent to which the person appears to have responded to the efforts made to improve his/her social attitude;
4. The industrial record of the inmate while in prison; and
5. The educational programs in which the inmate has participated and the level of education which the person has attained.[47]

Additionally, the Board may conduct a further investigation into the inmate,[48] and in cases in which it "seriously considers" commuting the inmate's death sentence, it may notify the sentencing judge and invite him/her to express his/her views on the proposed action.[49]

3. Clemency Hearings on the Merits of Petitions for Pardons and Commutations

The Board may hold an appointment/hearing on the inmate's petition for a pardon and/or a commutation, if it deems it necessary.[50] Generally speaking, the Board will set an appointment to meet with those advocating for the commutation of an inmate's death sentence the day before the execution is scheduled.[51] A separate appointment/hearing may be held to hear arguments from those opposing the pardon or commutation.[52] A

---

[45] O.C.G.A. § 42-9-20 (2004); GA. COMP. R. & REGS. 475-3-.10(2)(b) (2004).

[46] O.C.G.A. § 42-9-41(a)(1)-(8) (2004).

[47] O.C.G.A. § 42-9-43(a)(1)-(5) (2004). These factors also may be considered in a case in which the inmate petitions for a pardon. *Id.* These factors, however, only are relevant to a petition for a pardon not based on innocence, as they do not relate to the inmate's innocence, which is the only factor relevant to a petition for a pardon based on innocence. *See* GA. COMP. R. & REGS. 475-3-.10(3)(a)–(b) (2004).

[48] O.C.G.A. § 42-9-43(a) (2004).

[49] GA. COMP. R. & REGS. 475-3-.07 (2004).

[50] GA. COMP. R. & REGS. 475-3-.10(2)(b) (2004).

[51] E-mail Interview with Kim Patton-Johnson, Public Information Officer, Board of Pardons and Paroles (Feb. 4, 2005) (on file with author).

[52] *See, e.g.*, Board of Pardons and Paroles, News Release: Board Denies Clemency Request for Eddie Crawford, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 18, 2005); Board of Pardons and Paroles, News Release: Board Appointment Set for Richmond County D.A., *at*

decision on the inmate's petition normally will be announced the same day as the appointment.[53]

D. Clemency Decisions

Following the review of the petition and clemency hearing, if held, Board members will deliberate individually and then vote on whether a pardon or a commutation is warranted.[54] All information both oral and written received by the Board during the clemency process is classified "as confidential state secrets" unless declassified by the Board.[55]

In order for the Board to grant a pardon or commute a death sentence, a majority of the Board must vote in the affirmative.[56] If a majority of the Board votes in favor of a commutation, the Board possesses the authority to "commute a sentence of death to one of life imprisonment."[57] All Board decision's granting a pardon or commutation must be put into writing and signed by at least a majority of the Board.[58]

In its written decision, the Board is not required to disclose the vote breakdown of its decision or whether an individual Board member voted "yea" or "nay."[59] The Board, however, may release additional information on the vote breakdown pursuant to a request by the Governor or Attorney General or if it agrees to do so by unanimous consent.[60] The Chair of the Board may also disclose "sufficient information" to the public to clarify "misleading or erroneous allegations" when s/he determines it to be in the best interest of the public and parole system.[61]

---

http://www.pap.state.ga.us/News.htm (last visited on Aug. 18, 2005); Rhonda Cook, *State Puts Off Execution Board to Rethink Mentally Ill Killer's Case*, ATLANTA J. CONST., Feb. 20, 2002, at A1 (noting that the victim's mother and the Richmond County District Attorney met with the Board to discuss the clemency petitioner's case); Rhonda Cook, *Pardons Panel Refuses Clemency for Killer*, ATLANTA J. CONST., Nov. 14, 2001, at E1 (noting that the Cobb County District Attorney met with members of the Board "to encourage them to deny the request for clemency").

[53] E-mail Interview with Kim Patton-Johnson, Public Information Officer, Board of Pardons and Paroles (Feb. 4, 2005) (on file with author).

[54] *Id.*; *see also* Board of Pardons and Paroles, Frequently Asked Questions, *at* http://www.pap.state.ga.us/faq's.htm (last visited on Aug. 18, 2004).

[55] GA. COMP. R. & REGS. 475-3-.09 (2004).

[56] O.C.G.A. §§ 42-9-42(a), -20 (2004); 1973 Op. Att'y Gen. No. 73-137.

[57] O.C.G.A. § 42-9-20 (2004). *But see* Mitch Stacy, *Williams' Sentence Commuted Mentally Ill Killer to Serve Life Sentence With No Parole*, MACON TELEGRAPH, Feb. 26, 2002, at A1 (discussing the commutation of Alexander Williams' sentence to life without parole); Beth Warren, *Mental Illness Cited in Plea with Execution Set for Tonight, Killer's Lawyers Seek Clemency*, ATLANTA J. CONST., Nov. 19, 2002, at D4 (discussing the types of sentences given to the inmates whose sentences were commuted and noting that one of the inmates' sentences was commuted to life without parole).

[58] O.C.G.A. § 42-9-42(b) (2004).

[59] GA. COMP. R. & REGS. 475-3-.09 (2004).

[60] *Id*.

[61] *Id*.

If the Board grants the inmate's petition for a pardon, the correctional officials must inform the inmate of the terms and conditions of the pardon and release him/her accordingly.[62] On the other hand, if the Board grants the inmate's petition for a commutation to life imprisonment, the inmate must serve a minimum of twenty-five years before s/he may be eligible for a pardon or parole.[63]

If the Board denies the inmate's petition for a pardon or commutation, a new execution date will be set.

---

[62] O.C.G.A. § 42-9-43(c) (2004).
[63] GA. CONST. art. IV, § 2, para. 2(b)(1).

II. ANALYSIS

A. Recommendation #1

> **The clemency decision making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.**

The State of Georgia requires the Board to conduct a "complete and fair" review of all petitions for commutation.[64] It is unclear, however, what a "complete and fair" review encompasses, as neither the Official Code of Georgia Annotated (O.C.G.A.) nor the Rules of State Board of Pardons and Paroles describe the scope of a "complete and fair" review. Similarly, neither the O.C.G.A. nor the Rules mention the appropriate process for considering petitions for pardons.

Because it is unclear what the command to conduct a "complete and fair" review encompasses, in terms of both substance and process, it is not possible to assess whether the State of Georgia is in compliance with Recommendation #1.

B. Recommendation #2

> **The clemency decision making process should take into account all factors that might lead the decision maker to conclude that death is not the appropriate punishment**.

Recommendation #2 requires clemency decision makers to consider "all factors" that might lead the decision maker to conclude that death is not the appropriate punishment. "All factors" include, but are not limited to, the following:

> (1) constitutional claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not "unreasonable," state court rulings;
> (2) constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
> (3) lingering doubts of guilt (as discussed in Recommendation #4);
> (4) facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
> (5) patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);

---

[64] *See supra* note 44 and accompanying text.

(6) inmates' mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and
(7) inmates' age at the time of the offense (as discussed in Recommendation #4).[65]

As discussed under Recommendation #1, neither the O.C.G.A. nor the Rules mention the appropriate process for considering petitions for pardons, but the Rules require the Board to conduct a "complete and fair" review of all petitions for commutation. The O.C.G.A. and the Rules, however, do not specify what a "complete and fair" review should encompass.

Given that it is unclear what a "complete and fair" review encompasses, it is helpful to review the types of information that the Board must acquire before making any clemency decision. For all petitions for clemency, the O.C.G.A. and the Rules require the Board to "obtain" information pertaining to an inmate's criminal history and offense[66] and "cause to be brought before it" information regarding the inmate's behavior while in prison, including the results of any physical and mental examinations.[67] The information that the Board is required to "obtain" and "cause to be brought before it" is limited to discrete issues and only includes one of the seven factors required by Recommendation #2—the mental condition of the inmate. We note, however, that in considering petitions for pardons, it appears that the Board may also consider newly discovered evidence, which is another one of the seven factors required by Recommendation #2.[68] The Board also is authorized, but not required, to conduct a further investigation into the inmate.[69]

Although the Board is required to conduct a "complete and fair" review and "obtain" and "cause to be brought before it" certain information regarding the inmate, it remains unclear what factors the Board is required to consider when assessing an inmate's petition for a commutation. In an effort to ascertain the types of factors considered, we reviewed some of the reasons given by the Board for its past clemency decisions.

Since Georgia reinstated the death penalty in 1973, forty-seven inmates sentenced to death have requested a commutation.[70] Of those forty-seven inmates, the Board has commuted the death sentences of eight inmates[71] to either life imprisonment or life without parole.[72] The Board's decision to commute these inmates' death sentences can be

---

[65] AMERICAN BAR ASSOCIATION, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES (2002).
[66] O.C.G.A. § 42-9-41(a)(1)-(8) (2004).
[67] O.C.G.A. § 42-9-43(a) (2004).
[68] GA. COMP. R. & REGS. 475-3-.10(3)(a) (2004); O.C.G.A § 42-9-39(d) (2004).
[69] O.C.G.A. § 42-9-43(a) (2004).
[70] E-mail Interview with Kim Patton-Johnson, Public Information Officer, Board of Pardons and Paroles (Feb. 4, 2005) (on file with the author).
[71] *Id*.
[72] The names of the eight individuals are as follows: Charles Harris Hill (life imprisonment), Keith Eugene Patillo (life imprisonment), Eli Beck (life imprisonment), Harold Glenn Williams (life

attributed largely to three factors: (1) proportionality of the inmate's death sentence,[73] (2) the mental condition of the inmate,[74] and (3) the behavior of the inmate while in prison combined with support for commutation.[75]

The Board also has posthumously pardoned a woman originally denied clemency and executed in 1945.[76] Without publicly acknowledging a reliance on any of the seven factors required by Recommendation #2 for its posthumous pardon, a Board spokesperson stated that the decision to deny clemency in 1945 was "a grievous error, as this case called out for mercy."[77]

The factors considered by the Board when denying inmates' requests for clemency are more difficult to ascertain, as the Board is not required to explain its decisions and rarely

---

imprisonment), Freddie Davis (life imprisonment), William Neal Moore (life imprisonment), Alexander Williams (life imprisonment without parole), Willie James Hall (life imprisonment without parole). *See e.g.* Carlos Campos & Bill Rankin, *Murderer's Sentence Commuted*, ATLANTA J. CONST., Jan. 27, 2004, at B1; Cook, *State Puts Off Execution Board to Rethink Mentally Ill Killer's Case*, *supra* note 52 (discussing the Davis' case); Jingle Davis, *Ex-Marine's Death Sentence For Murder Is Commuted*, ATLANTA J. CONST., March 23, 1991, at B5 (discussing Harold Williams' case); Holly Morris, *Board Spares Murderer Term Commuted to Life in Prison*, ATLANTA J. CONST., Aug. 22, 1990, at A01 (discussing Moore's case); Stacy, *supra* note 57 (discussing the Alexander Williams' case); Warren, *supra* note 57.

[73] Charles Harris Hill – Board found Hill's sentence was disproportionate because an accomplice who admitted to stabbing the murder victim was sentenced to life; Harold Glenn Williams – Board found Williams' sentence was disproportionate because his uncle, who was an accomplice, pleaded guilty to manslaughter and received a sentence of ten years; Freddie Davis – Board found Davis' sentence was disproportionate because a co-defendant, who was determined to be mentally retarded and, thus, ineligible for death penalty, admitted to the murder. *See supra* note 72.

[74] Keith Eugene Patillo - Board commuted Patillo's sentence because he was determined to be mentally retarded; Eli Beck - Board commuted Beck's sentence because he was determined to be mentally retarded; and Alexander Williams – Board commuted Williams's sentence because it determined he suffered from mental illness. *See supra* note 72; *see also* Stacy, *supra* note 57 (discussing the severity of Alexander Williams' mental illness; noting that he thinks Sigourney Weaver is God).

[75] William Neal Moore – Board noted the inmate's successful rehabilitation and support voiced by the victim's family weighed heavily in its decision; Willie James Hall – Board persuaded by prisoner's model behavior while incarcerated, sworn statements by six jurors who said they would have voted for life without parole if it were an option at trial, and statement of district attorney that he was comfortable with commutation. *See supra* note 72.

[76] *See Executed Woman to Get Pardon in Georgia*, N.Y. TIMES, August 16, 2005. Lena Baker, a black maid, was sentenced to death by an all-white, all-male jury, and executed for the murder of her white employer, E.B. Knight. *Id.* She testified that she "grabbed Knight's gun and shot him when he raised a metal bar to strike her," and that Knight "held her against her will in a grist mill and threatened to shoot her if she tried to leave." *Id.* In addition to Lean Baker, the Board of Pardons and Paroles also granted a pardon to Henry Drake, who was originally sentenced to death, but at the time of the pardon, Drake was serving a life sentence because his death sentence had been vacated by the federal appeals court and he had been resentenced to life in prison. *See* Drake v. Kemp, 762 F2d 1449, 1449 (11th Cir. 1985); Gibson v. Turpin, 513 S.E.2d 186, 198 n.28 (Ga. 1999). Forejustice, Wrongly Convicted Database Record: Henry Arthur Drake, *at* http://forejustice.org/db/Drake__Henry_Arthur_.html (last visited on Sept. 12, 2005).

[77] *Id.*

does so when denying clemency.[78] After reviewing all of the "News Releases" released by the Board since January 2, 1998, only two of the releases mention the Board's rationale for denying clemency and both releases pertain to the clemency petitions of one inmate, Eddie Crawford.[79] When denying Crawford's first request for clemency, the Board cited the following reasons: "the viciousness of the crime, the age of the victim, and the fact that the murder was committed during an attempt to rape the young victim."[80] Similarly, the Board denied his second request for clemency by stating that it was convinced of his guilt given "the overwhelming evidence of [] guilt, including his own comments about the murder following his arrest, and critical pieces of evidence that have already been tested for DNA linking Crawford to the crime."[81]

Based on a review of the Board's decisions, it is clear that the Board has previously considered factors recommended by Recommendation #2. But, we were unable to obtain sufficient information to assess whether the Board is required to consider "all factors" recommended by the ABA. To ensure that "all factors" recommended by the ABA are considered when reviewing petitions for clemency, we recommend that a rule be adopted delineating the factors that the Board must consider when reviewing all petitions for clemency.

C. Recommendation #3

Clemency decision makers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.

Recommendation #4

Clemency decision makers should consider as factors in their deliberations the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence relating to a lingering doubt about the inmate's guilt.

---

[78] *See supra* notes 59-61 and accompanying text; *see also* Carlos Campos, *Murderer Denied Clemency Parole Board Rules Despite Plea From the Victim's Mother*, ATLANTA J. CONST., Feb. 26, 2005 (noting that "[t]he five-member parole board does not discuss its decisions to deny clemency, said spokeswoman Kim Patton-Johnson").

[79] *See* Board of Pardons and Paroles, News Release: Parole Board Denies Clemency Request for Eddie Crawford, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005)*;* Board of Pardons and Paroles, News Release: Board Denies Clemency Request for Eddie Crawford, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005).

[80] *See* Board of Pardons and Paroles, News Release: Parole Board Denies Clemency Request for Eddie Crawford, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005).

[81] *See* Board of Pardons and Paroles, News Release: Board Denies Clemency Request for Eddie Crawford, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005).

Recommendation #5

Clemency decision makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.

As discussed in the analysis under Recommendation #2, it is unclear what factors the Board must consider when assessing an inmate's petition for clemency. The Board, however, is required to "obtain" information pertaining to the inmate's criminal history and offense and "cause to be brought before it" information about the inmate's behavior while in prison.[82]

The information that the Board must "obtain" or "cause to be brought before it" is not relevant to Recommendation #3, but some of it is relevant to Recommendations #4 and 5. This information includes the results of any of the inmate's mental and physical examinations, the inmate's conduct while in prison, the extent to which the person appears to have responded to the efforts made to improve his/her social attitude, the industrial record of the inmate while in prison, and the educational programs in which the inmate has participated and the level of education which the person has attained.[83] It appears that the Board has considered some of this information when assessing inmates' petitions for clemency. For example, based on the eight cases in which the Board has commuted inmates' death sentences, the Board has considered the inmate's mental condition in at least three cases[84] and the inmate's behavior while in prison in at least two cases.[85]

Although the Board has previously considered issues relevant to Recommendations #4-5, we were unable to obtain sufficient information to assess whether the Board is required to consider the factors addressed in Recommendations #3-5. To ensure that the factors included in Recommendations #3-5 are considered when reviewing petitions for clemency, we recommend that a rule be adopted delineating the factors that the Board must consider when reviewing all petitions for clemency.

---

[82] *See supra* notes 23 and 47 and accompanying text.

[83] However, the Board is not required to "obtain" or "cause to be brought before it" information regarding the inmate's age at the time of the offense or evidence relating to lingering doubts about the inmate's guilt.

[84] *See supra* notes 72-75.

[85] *Id.*; *see also* Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post*-Furman *Capital Cases*, 27 U. RICH. L. REV. 289, 302-03, 312 (1993) (noting that the case of William Neal Moore was the only case reviewed by the authors in which rehabilitation of the offender while in prison was the primary reason given for the commutation of the death sentence).

D. Recommendation #6

In clemency proceedings, the death row inmates should be represented by counsel and such counsel should have qualifications consistent with the American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases.

The State of Georgia does not have any laws, rules, procedures, standards, or guidelines requiring the appointment of counsel to inmates petitioning for clemency. It should be noted though that in April 2005, the Georgia Public Defender Standards Council (GPDSC) adopted, as the "GPDSC Death Penalty Defense Standards," the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines), which require counsel to be provided at all stages of a capital trial, including clemency proceedings.[86] The GPDSC, however, adopted the ABA Guidelines "in full except where they contradict Georgia law."[87] Given that the Georgia Supreme Court, in *Gibson v. Turpin*,[88] has found that there is no constitutional right to appointed counsel beyond direct appeal, it appears that the ABA Guideline requiring counsel for clemency proceedings may potentially contradict Georgia law, meaning that it would not be an enforceable requirement under the GPDSC Death Penalty Defense Standards. The ABA Guidelines also require clemency attorneys to possess certain qualifications, but it is unclear whether the qualification requirements apply to attorneys handling clemency petitions given that clemency petitioners are not entitled to be represented by counsel.[89] Additionally, the GPDSC Death Penalty Defense Standards have yet to become effective, as we have been told that the standards have been determined to have a "fiscal impact" and require ratification by the General Assembly to become effective.[90]

---

[86] GA. PUB. DEFENDER STANDARDS COUNCIL, DEATH PENALTY DEFENSE STANDARDS, *at* http://www.gidc.com/cpdsystem-standards-death_penalty_case.pdf (last visited on Sept. 13, 2005); ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEATH PENALTY CASES (2003) [hereinafter ABA GUIDELINES], *at* http://www.gpdsc.com/cpdsystem-standards-aba_dp_guidelines.pdf (last visited on Sept. 13, 2005); GA. PUB. DEFENDER STANDARDS COUNCIL, FINAL PAGE OF DEATH PENALTY DEFENSE STANDARDS, *at* http://www.gidc.com/cpdsystem-standards-death_penalty_case_final_page.pdf (last visited on Sept. 13, 2005).

[87] *Id.*

[88] Gibson v. Turpin, 513 S.E.2d 186 (Ga. 1999) (finding no right to appointed counsel in a state habeas corpus proceeding).

[89] ABA GUIDELINES, *supra* note 86.

[90] All standards adopted by the GPDSC that are determined by the General Oversight Committee to have a "fiscal impact" are not effective until ratified by joint resolution of the General Assembly and upon approval of the resolution by the Governor or upon its becoming law without his/her approval. *See* O.C.G.A. 17-12-8(c) (2005); *see also* Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author); Georgia Public Defender Standards Council, 2005 Legislative Session Report #8, *at* http://www.gpdsc.com/resources-legislation-update_04-05-05.htm (last visited on Oct. 5, 2005) (noting the General Oversight Committee "determined that all of the standards adopted [as of March 23, 2005] by the [GPDSC] have a fiscal impact").

On the issue of representation at clemency proceedings, the Board's website clearly states that "[r]epresentation by an attorney is not necessary for any type of clemency consideration."[91] It further states that "[c]onsideration for parole is automatic, and procedures for application for other types of clemency are not too formal or complex for the average person to understand."[92] Inmates, however, may have a privately obtained attorney represent them throughout the clemency process.[93]

The State of Georgia does not require attorneys representing inmates petitioning for clemency to possess qualifications consistent with the recommendations contained in the Defense Services Section. Rather, the O.C.G.A. and the Rules contain just one qualification requirement and it only pertains to attorneys who are being paid to appear or practice in any matter before the Board.[94] The O.C.G.A. and the Rules require these attorneys to be licensed and active members in good standing of the State Bar of Georgia.[95] Neither the O.C.G.A. nor the Rules require paid attorneys to possess any other qualifications or mention any requisite qualifications for non-paid attorneys.

Based on this information, the State of Georgia fails to comply with the requirements of Recommendation #6. Not only does it fail to provide for the appointment of counsel to inmates petitioning for clemency, but it also does not require attorneys representing inmates throughout the clemency process to possess qualifications consistent with the recommendations in the Defense Services Section.

E. Recommendation #7

> **Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.**

The State of Georgia does not have any laws, rules, procedures, standards, or guidelines entitling death-row inmates' counsel to compensation (see analysis under Recommendation #6) or access to investigative and expert resources.[96]

---

[91] Board of Pardons and Paroles, Other Forms of Clemency, *at* www.pap.state.ga.us/other_forms_clemency.htm (last visited on Aug. 19, 2005).

[92] *Id.*

[93] GA. COMP. R. & REGS. 475-3-.02 (2004).

[94] O.C.G.A. § 42-9-16(a) (2004); GA. COMP. R. & REGS. 475-3-.02(3) (2004); *see also* Georgia Board of Pardons and Paroles, Other Forms of Clemency, *at* www.pap.state.ga.us/other_forms_clemency.htm (last visited on Aug. 19, 2005).

[95] O.C.G.A. § 42-9-16(a) (2004); GA. COMP. R. & REGS. 475-3-.02(3) (2004); *see also* Georgia Board of Pardons and Paroles, Other Forms of Clemency, *at* www.pap.state.ga.us/other_forms_clemency.htm (last visited on Aug. 19, 2005).

[96] *See generally* GA. COMP. R. & REGS. 475-3-.10(2)(b) (2004); O.C.G.A. §§ 42-9-41, -43 (2004).

Although death-row inmates' counsel are not entitled to compensation or resources, it does appear that they have sufficient time to develop the basis for any factors upon which clemency might be granted that previously were not developed, as there are no filing deadlines for clemency petitions. It does not appear, however, that death-row inmates' counsel are provided with an opportunity to rebut evidence that the state presents in opposition to clemency. For example, after an inmate files his/her petition for clemency, the state is not required to file any documents explaining its opposition to the inmate's petition. Similarly, if the Board holds an appointment/hearing on an inmate's clemency petition, it hears separately and privately from those supporting and those opposing clemency (see analysis under Recommendation #8). Thus, it appears that a death-row inmate may never hear the states' arguments opposing his/her clemency petition.

Based on this information, the State of Georgia is only in partial compliance with Recommendation #7.

F. Recommendation #8

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

The State of Georgia does not have any laws, rules, procedures, standards, or guidelines requiring the Board to hold and preside over public interviews, meetings, or hearings on the merits of inmates' requests for clemency.[97] According to the Board's Public Information Officer,[98] however, the Board generally holds and presides over an appointment/hearing on an inmate's request for clemency on the day before the execution is scheduled.[99] The appointment/hearing is not public and is closed to the media.[100] Not

---

[97] GA. COMP. R. & REGS. 475-3-.10(2)(b) (2004).

[98] *See* E-mail Interview with Kim Patton-Johnson, Public Information Officer, Board of Pardons and Paroles (Feb. 4, 2005) (on file with author).

[99] *See id.* (noting that "[a]ll Board members will be present for the appointment"); *see also* Board of Pardons and Paroles, News Release: Board Appointment for Robert Hicks Is Rescheduled, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Board of Pardons and Paroles, News Release: Board Sets Second Appointment for Eddie Crawford, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Board of Pardons and Paroles, News Release: Board Sets Appointment for Timothy Don Carr, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Board of Pardons and Paroles, News Release: Board Sets Appointment for Stephen Mobley, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Board of Pardons and Paroles, News Release: Board Sets Appointment For Larry Eugene Moon, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Board of Pardons and Paroles, News Release: Board Appointment for Robert Hicks Is Rescheduled, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Board of Pardons and Paroles, News Release: Board Appointment Set For Wallace Fugate, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Board of Pardons and Paroles, News Release: Board Sets Appointment for Stephen Mobley, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005).

[100] *See, e.g.*, Board of Pardons and Paroles, News Release: Board Sets Appointment for Timothy Don Carr, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Sandy Hodson, *Board Will*

only are the appointments/hearings not open to the public, if and when they are held, all other parts of the clemency process are private. The Board is not required to release to the public the evidence it considered during the clemency process, its reasons for granting or denying an inmate's clemency petition, or its vote count on the inmate's petition.[101]

Furthermore, when the Board holds and presides over appointments/hearings, it does not appear that all five Board members are required to attend each inmate's appointment/hearing. For example, then-Board member Gene Walker failed to attend the appointment/hearing on Fred Gilreath's request for clemency and, despite his absence, voted to deny Gilreath's clemency request.[102] When Mr. Gilreath challenged the Georgia clemency process for failing to comply with due process, the United State District Court for the Northern District of Georgia, in upholding the clemency process, noted that Walker was not the first member to be absent at an inmate's appointment/hearing and that prior to casting his ballot, Walker "had seen a comprehensive written file on the matter and had the oral presentations summed up for him by a clemency-board lawyer."[103]

Even if the Board generally holds appointments/hearings on inmates' requests for clemency, it is not required to and may not hold appointments/hearings in all cases.[104] Similarly, if and when an appointment/hearing is held, the Board is not required to hold the appointment/hearing in public and all Board members are not required to attend. The State of Georgia, therefore, fails to meet the requirements of Recommendation #8.

G. Recommendation #9

> **If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.**

The State of Georgia does not have any laws, rules, procedures, standards, or guidelines requiring the entire Board or any of its five members to meet with inmates petitioning for clemency at any time during the clemency process. As discussed under Recommendation # 8, the Board or at least some of its members generally hold an appointment/hearing on an inmate's request for clemency, but the purpose of the appointment/hearing is for the

---

Rule on Execution; Attorney of Death Row Inmate Will Request that Officials Commute Sentence to Life in Prison, AUGUSTA CHRON., Aug. 18, 2000, C01 (noting that "the [parole] hearing is closed to the public, but anyone may write to the parole board in support of or opposition to clemency, [spokesperson Kathy Browning] said").

[101] *See* GA. COMP. R. & REGS. 475-3-.09 (2004).

[102] Cook, *Pardons Panel Refuses Clemency for Killer*, *supra* note 52.

[103] Gilreath v. State Board of Pardons and Paroles, 273 F.2d 932, 934 (11th Cir. 2001).

[104] *See* James R. Acker & Charles S. Lanier, *May God—Or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death Penalty Systems*, 36 CRIM. L. BULL. 200, 224 n.122 (2000) (noting that "the Georgia Board of Pardons and Paroles had summarily denied four of the seven applications for clemency it had received in capital cases without a hearing, and had conducted hearings in the other three cases").

Board members to meet with "representatives for the condemned inmate," not the inmate himself/herself.[105] It does not appear that the entire Board or any members of the Board ever meet with the clemency petitioner during the clemency process. In fact, apart from attending the appointment/hearing, which not all Board members are required to attend, the Board is not required to and does not ever meet in entirety to discuss or deliberate inmates' petitions for clemency.[106]

The State of Georgia is not in compliance with Recommendation #9, as it does not require the Board to meet with clemency petitioners at any time during the clemency process.

H. Recommendation #10

> **Clemency decision makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.**

The State of Georgia does not have any laws, rules, procedures, standards, or guidelines requiring the Board to be fully educated, or to encourage the education of the public, about the nature of clemency powers or the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency. Instead, the Board members are trained "internally" by senior managers and directors of each division within the parole system and have the option, but are not required, to attend periodic training sessions. Although Board members are provided with internal training, the scope and content of the training is unknown. Similarly, the optional periodic training sessions are not particular to the clemency process and the regularity of sessions pertaining to clemency is unknown.[107] Based on this information, the State of Georgia fails to meet the requirements of Recommendation #10.

---

[105] *See, e.g.*, Board of Pardons and Paroles, News Release: Board Denies Fugate Petition, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005); Board of Pardons and Paroles, News Release: Parole Board Denies Clemency for Larry Eugene Moon, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005). "Representatives for condemned inmates" seem to include attorneys, other representatives advocating for clemency, and friends and family members of the inmate). *Id.* It is unclear whether the inmate is authorized to be present at the hearing if s/he does not have any "representatives."

[106] *See* E-mail Interview with Kim Patton-Johnson, Public Information Officer, Board of Pardons and Paroles (Feb. 4, 2005) (on file with author); *see also* Board of Pardons and Paroles, News Release: Board Appointment for Robert Hicks Is Rescheduled, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005).

[107] *See* Board of Pardons and Paroles, News Release: Parole Board Schedules Open Meeting For Training, *at* http://www.pap.state.ga.us/News.htm (last visited on Aug. 19, 2005) (noting that in June 2003, the Department of Justice conducted a daylong session for Board members about overseeing sex offenders).

I. Recommendation #11

To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

In the State of Georgia, the Board possesses the authority to make clemency determinations[108] and no other branch of the government is authorized to "usurp or substitute its functions for the functions of the Board."[109] The Board is not required to release to the public the evidence it considered during the clemency process or to explain any of its clemency decisions, and each Board member's decision to grant or deny clemency is completely confidential.[110] Thus, the responsibility for and criticism associated with any particular clemency decision is shared among the entire Board. Both the Board's exclusive authority to make clemency decisions and the confidentially surrounding the decision making process serve to insulate the Board from political considerations and impacts.

Because the materials considered by the Board are not part of public record, it is impossible to determine the extent to which inappropriate political considerations or impacts are introduced into the process.

---

[108] GA. CONST. art. IV, § 2, para. 1.
[109] O.C.G.A. § 42-9-1 (2004).
[110] GA. COMP. R. & REGS. 475-3-.09 (2004).

CHAPTER TEN

VOIR DIRE AND CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the "awesome responsibility" of deciding whether another person will live or die.[1] Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors' decision making. Often, however, jury instructions are poorly written and conveyed. As a result, instructions often serve only to confuse jurors, not to communicate.

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Some trial courts, whether intentionally or not, give instructions that may lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors conclude that their decisions are not vitally important in determining whether a defendant will live or die.

It also is important that courts ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of "life without parole" does not ensure that the offender will remain in prison for the rest of his or her life. Such jurors may vote to impose a death sentence because they erroneously believe that otherwise, the defendant may be released within a few years.

It is similarly vital that jurors understand the true meaning of mitigation and their ability to bring mitigating factors to bear in their consideration of capital punishment. Unfortunately, jurors often believe that mitigation is the same as aggravation, or that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.

---

[1] Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

I. FACTUAL DISCUSSION

A. *Voir Dire*

In any case in which the state announces its intention to seek the death penalty, the court must impanel at least 42 prospective jurors from which the state and defense must select a total of twelve jurors[2] and one or more alternative jurors, if deemed necessary by the judge.[3] If after striking from the panel there are less than twelve qualified jurors, the presiding judge must "summon such numbers of persons who are competent jurors as may be necessary to provide a full panel."[4] The state and defense will examine the prospective jurors to assess their qualifications and overall fitness to serve. This process is known as *voir dire*.

1. Structure and Scope of *Voir Dire*

In a death penalty case, either the state or the defense may request a sequestered *voir dire*. The granting of a sequestered *voir dire*, however, is within the sole discretion of the judge.[5] To support a claim that a denial of sequestered *voir dire* was an abuse of discretion, the defendant must prove that s/he was prejudiced by the denial.[6]

The scope of *voir dire* is largely left to the court's discretion[7] and the court may limit the types of questions asked.[8] The scope of *voir dire*, however, must be broad enough to ascertain the "fairness and impartiality" of the prospective jurors[9] and their views regarding the death penalty.[10]

During *voir dire*, the judge must ask the prospective jurors the "usual *voir dire* questions."[11] The "usual *voir dire* questions" are the four questions articulated in section

---

[2] O.C.G.A. § 15-12-160 (2004).

[3] O.C.G.A. § 15-15-168 (2004).

[4] O.C.G.A. § 15-12-160 (2004).

[5] *See* Sanborn v. State, 304 S.E.2d 377, 379 (Ga. 1983); *see also* Curry v. State, 336 S.E.2d 762, 766 (Ga. 1985) (finding no abuse of discretion in the court's denial of sequestered *voir dire*, either individually, or by panels, absent evidence that prospective jurors lied under oath as result of being "educated" by listening to the *voir dire* of other prospective jurors); Finney v. State, 320 S.E.2d 147, 150 (Ga. 1984) (finding denial of sequestered *voir dire* not an abuse of discretion, where defendant failed to show any prejudice from the denial).

[6] O.C.G.A. § 15-12-133 (2004); *Sanborn*, 304 S.E.2d at 379.

[7] Lawler v. State, 576 S.E.2d 841, 848 (Ga. 2003); Barnes v. State, 496 S.E.2d 674, 683 (Ga. 1998).

[8] O.C.G.A. § 16-5-1(c) (2004); Carter v. State, 315 S.E.2d 646, 651 (Ga. 1984); *see also* Cobb v. State, 260 S.E.2d 60, 66 (Ga. 1979) (finding trial judge did not abuse discretion in limiting *voir dire* examination so as to exclude two questions to the effect of whether prospective jurors would have been reluctant to return not guilty verdict or to vote against death penalty if they had, or were only jurors who had, reasonable doubts about such matters since such questions were technical legal questions concerning presumption of innocence).

[9] *Barnes*, 496 S.E.2d at 674; *see also* Cromartie v. State, 514 S.E.2d 205, 211 (Ga. 1999).

[10] *Cromartie*, 514 S.E.2d at 211.

[11] O.C.G.A. § 15-12-133 (2004); *see also* Jordan v. State, 276 S.E.2d 224, 234 (Ga. 1981).

15-12-64 of the Official Code of Georgia Annotated (O.C.G.A.), which will be discussed below.[12] The judge must address all questions pertaining to opposition to the death penalty ("*Witherspoon* questions")[13] and support of the death penalty ("reverse-*Witherspoon* questions")[14] to each prospective juror individually.[15] The state and defense also have the right to individually examine each juror.[16] The judge, however, may require that questions be addressed once only to the full array of prospective jurors as long as the jurors are able to respond individually to the questions asked.[17]

The O.C.G.A. specifically provides that the state and defense have the right to ask any prospective juror "any matter or thing which would illustrate any interest of the juror in the case . . . any fact or circumstance indicating any inclination, leaning, or bias which the juror might have respecting the subject matter of the action or the counsel or parties thereto, and the religious, social, and fraternal connection of the juror."[18] The Georgia Supreme Court, however, has limited this broad statement of allowable questions during *voir dire*.[19] These limitations are discussed below.

a. Required Questioning During *Voir Dire*

Pursuant to section 15-12-164 of the O.C.G.A., jurors must be asked the following "usual" questions during *voir dire*:

> (1) Have you, for any reason, formed and expressed any opinion in regard to the guilt or innocence of the accused? If the juror answers in the negative, the question in paragraph (2) of this subsection shall be propounded to him[/her];

---

[12] *Jordan*, 276 S.E.2d at 234.

[13] *See* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (holding that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction").

[14] *See* Morgan v. Illinois, 504 U.S. 719, 724 (1992).

[15] GA. UNIF. SUPER. CT. R. 10.1; Miller v. State, 380 S.E.2d 690, 692 (Ga. 1989) (finding that judge did not commit error by death-qualifying each juror); Cargill v. State, 340 S.E.2d 891, 901 (Ga. 1986); Curry v. State, 336 S.E.2d 762, 766 (Ga. 1985) (stating that trial judge has "exclusive responsibility for asking all *Witherspoon* and reverse-*Witherspoon* questions"). It is important to note that prior to the 1985 adoption of Uniform Superior Court Rule 10.1, courts were not required to address *Witherspoon* and reverse-*Witherspoon* questions to the prospective jurors individually. *See, e.g.*, Arnold v. State, 224 S.E.2d 386, 391 (Ga. 1976) (finding "no error in propounding the *Witherspoon* and reverse-*Witherspoon* questions to the veniremen in a group").

[16] O.C.G.A. § 15-12-133 (2004) (formerly GA. CODE ANN. § 59-705).

[17] GA. UNIF. SUPER. CT. R. 10.1.

[18] O.C.G.A. § 15-12-133 (2004).

[19] Henderson v. State, 306 S.E.2d 645, 646-48 (Ga. 1983).

> (2) Have you any prejudice or bias resting on your mind either for or against the accused? If the juror answers in the negative, the question in paragraph (3) of this subsection shall be propounded to him[/her];
>
> (3) Is your mind perfectly impartial between the state and the accused? If the juror answers this question in the affirmative, [s/]he shall be adjudged and held to be a competent juror in all cases where the authorized penalty for the offense does not involve the life of the accused; but when it does involve the life of the accused, the question in paragraph (4) of this subsection shall also be put to him[/her];
>
> (4) Are you conscientiously opposed to capital punishment? (*Witherspoon*-question). If the juror answers this question in the negative, [s/]he shall be held to be a competent juror.[20]

Following these questions, the state and defense may introduce evidence to show that a juror's answers are untrue.[21] It is the duty of the judge to determine the truth of the answers.[22]

If a juror responds in the affirmative to question #4, meaning that s/he is conscientiously opposed to capital punishment, the court may ask the juror one or more of the following questions:

> (1) Would your reservations about capital punishment prevent you from making an impartial decision on the issue of punishment for the defendant's conviction of murder according to the evidence and the instructions of the court?
>
> (2) Are your reservations about capital punishment such that you could never vote to impose the death penalty regardless of the evidence and the instructions of the court?
>
> (3) Are your reservations about capital punishment such that you would refuse even to consider its imposition in the case before you regardless of the evidence and instructions of the court?
>
> (4) Are you irrevocably committed before the trial has even begun on the issue of punishment for the conviction of murder to vote against the

---

[20] O.C.G.A. § 15-12-164(a)(4) (2004); *see also Curry*, 336 S.E.2d at 766 (finding that the question "Are you conscientiously opposed to capital punishment?" is not so confusing as to render it unconstitutionally vague).

[21] O.C.G.A. § 15-12-164(b) (2004).

[22] O.C.G.A. § 15-12-164 (2004).

> penalty of death regardless of the evidence, facts, and circumstances that emerge in the course of the proceedings and instructions of the court?[23]

Neither the O.C.G.A. nor the Uniform Superior Court Rules contain pattern "reverse-*Witherspoon*" questions.

b. Proper Questioning During *Voir Dire*

The state and defense may ask the prospective jurors questions concerning their possible biases and prejudices.[24] This includes but is not limited to questions regarding racial bias,[25] as well as biases regarding parole.[26] However, questions about prospective jurors' biases regarding parole must be limited to "jurors' willingness to consider both a life sentence that allows for the possibility of parole and a life sentence that does not."[27] The Georgia Supreme Court, in *Zellmer v. State*, approved the following voir dire questions regarding parole:

> (a) If the defendant is found guilty of murder, and it becomes your duty to choose and impose one of the three sentencing options of death, life without parole, and life with the possibility of parole, and you do not feel death is the appropriate sentence, would you automatically choose and impose life without parole, without giving any consideration to a sentence of life with the possibility of parole? Are you conscientiously opposed to a sentence of life with the possibility of parole for one who has been found guilty of murder?
>
> (b) If the defendant is found guilty of murder, and it becomes your duty to choose and impose one of the three sentencing options of death, life without parole, and life with the possibility of parole, and you do not feel death is the appropriate sentence, would you automatically choose and impose life with the possibility of parole, without giving any consideration to a sentence of life without parole? Are you conscientiously opposed to a sentence of life without parole for one who has been found guilty of murder?[28]

---

[23] Redd v. State, 252 S.E.2d 383, 385-86 (Ga. 1979).

[24] *Henderson*, 306 S.E.2d at 647 n.1; Reid v. State, 200 S.E.2d 454, 455 (Ga. Ct. App. 1973) (citing Ham v. South Carolina, 409 U.S. 524 (1973)).

[25] *Henderson*, 306 S.E.2d at 647 n.1; *Reid*, 200 S.E.2d at 455.

[26] Lance v. State, 560 S.E.2d 663, 671 (Ga. 2002); Zellmer v. State, 534 S.E.2d 802, 803-04 (Ga. 2000).

[27] *Lance*, 560 S.E.2d at 671; *Zellmer,* 534 S.E.2d at 803-04.

[28] *Zellmer*, 534 S.E.2d at 803-04.

c. Improper Questioning During *Voir Dire*

The trial court may preclude the state and defense from asking "repetitive, misleading, and irrelevant questions."[29] Additionally, a prospective juror may not be asked questions pertaining to the law and its application to the case on trial,[30] questions that require him/her to prejudge the case,[31] or questions that require him/her to enumerate hypothetical circumstances in which s/he might or might not vote to impose the death penalty.[32] Questions regarding prospective jurors' understanding of the meaning of life sentences are not generally permitted in capital trials, as prospective jurors' views on the subject are extraneous to the ability to serve.[33]

After the judge, state, and defense have examined the prospective jurors on *voir dire*, the court will proceed to jury selection.[34]

2. Juror Selection

a. Challenges for Cause

A challenge for cause is "a request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons."[35] There are two types of challenges for cause: (1) challenges based on the prospective juror's qualifications to serve as a juror pursuant to section 15-12-163 of the O.C.G.A.; and (2) challenges based upon a prospective juror's admissions or facts or circumstances regarding the juror that raise the appearance of actual biases for or against one of the parties.[36]

---

[29] Fults v. State, 548 S.E.2d 315, 320 (Ga. 2001) (citing Gissendaner v. State, 532 S.E.2d 677, 679 (Ga. 2000)); Barnes v. State, 496 S.E.2d 674, 683 (Ga. 1998) (excluding questions that do not deal directly with the case at hand); Hall v. State, 383 S.E.2d 128, 130 (Ga. 1989).

[30] *Henderson*, 306 S.E.2d at 647 n.1.

[31] Lucas v. State, 555 S.E.2d 440, 447 (Ga. 2001); Rhode v. State, 552 S.E.2d 855, 859-60 (Ga. 2001) (finding that counsel's questions may not call for prejudgment of the case or fail to set forth the entire context in which the jury would consider the death sentence); Cobb v. State, 260 S.E.2d 60, 66 (Ga. 1979) (excluding the following question as it was an attempt to obtain a prejudgment of the case: "whether a prospective juror would have any bias or prejudice against a young person accused of a crime if the evidence revealed that he was acting under the direction and control of a much older person, such as his uncle").

[32] *Hall*, 383 S.E.2d at 130 (finding that it is improper to ask a prospective juror on voir dire to describe the kind of case that, in the juror's opinion, would or would not warrant a death sentence); *Gissendaner*, 532 S.E.2d at 677 n.12 (finding that capital murder defendant was not entitled to question potential jurors as to their willingness to impose death penalty under specific hypothetical circumstances); McMichen v. State, 458 S.E.2d 833 n.40 (Ga. 1995) (finding that trial court properly refused to permit defendant to question potential jurors concerning types of cases jurors felt would warrant death penalty).

[33] Waldrip v. State, 482 S.E.2d 299, 308 (Ga. 1997).

[34] GA. UNIF. SUPER. CT. R. 11.

[35] BLACK'S LAW DICTIONARY 157 (6th ed. 1991).

[36] Jordan v. State, 276 S.E.2d 224, 234 (Ga. 1981).

Section 15-12-163 of the O.C.G.A. provides that the state or defense may make any of the following objections regarding the juror's qualifications to serve:

1. That the juror is not a citizen, resident in the county;
2. That the juror is under 18 years of age;
3. That the juror is incompetent to serve because of mental illness or mental retardation, or that the juror is intoxicated;
4. That the juror is so near of kin to the prosecutor, the accused, or the victim as to disqualify the juror by law from serving on the jury;
5. That the juror has been convicted of a felony in a federal court or any court of a state of the United States and the juror's civil rights have not been restored; or
6. That the juror is unable to communicate in the English language.[37]

The state and the defense also may challenge a juror based upon his/her views and opinions on the death penalty and other views and opinions relevant to the case. The standard for determining whether a juror should be disqualified based upon his/her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his/her duties as a juror in accordance with his/her instructions and his/her oath.'"[38] Similarly, in order to disqualify a juror based upon other opinions or views, it must be established that the juror's opinion was "so fixed and definite" that the juror would not be able to set aside his/her opinion and decide the case based on the evidence and the court's instruction.[39]

If, during *voir dire*, a prospective juror expresses conscientious opposition to capital punishment, s/he cannot be automatically disqualified.[40] Rather, the judge, state, or defense must ask the juror additional questions to clarify the juror's views on capital punishment.[41] If a prospective juror states unambiguously that s/he would automatically vote against the imposition of capital punishment, notwithstanding the evidence introduced by the parties or the law charged by the judge, s/he can be excluded from serving on the jury.[42] Likewise, if a potential juror states that if the defendant was found guilty of the capital offense, s/he would automatically vote for the death penalty, s/he can be excluded for cause.[43]

---

[37] O.C.G.A. § 15-12-163 (2004).

[38] Brannan v. State, 561 S.E.2d 414, 422 (Ga. 2002); Jenkins v. State, 498 S.E.2d 502, 510 (Ga. 1998); Hill v. State, 427 S.E.2d 770, 774 (Ga. 1993).

[39] Fults v. State, 548 S.E.2d 315, 320 (Ga. 2001); Barnes v. State, 496 S.E.2d 674, 683 (Ga. 1998).

[40] Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (finding that it is unconstitutional to excuse a juror simply because s/he is conscientiously opposed to capital punishment); Curry v. State, 336 S.E.2d 762, 766 (Ga. 1985).

[41] *Curry*, 336 S.E.2d at 766; GA. UNIF. SUPER. CT. R. 10.1; *Brannan*, 561 S.E.2d at 422.

[42] U.S. CONST. amends. VI, XIV; Alderman v. Austin, 663 F.2d 558, 563 (5th Cir. 1981).

[43] Pope v. State, 345 S.E.2d 831, 838 (Ga. 1986), *overruled on other grounds by* Nash v. State, 519 S.E.2d 893, 894 (Ga. 1999); Finney v. State, 320 S.E.2d 147, 150 (Ga. 1984) (finding no error in refusing to excuse for cause three veniremen whose voir dire responses allegedly showed a bias in favor of the death penalty, where the voir dire testimony failed to show that any of the three would vote automatically for the

In determining whether a potential juror should be disqualified, the judge must view the *voir dire* responses as a whole.[44] "It is not isolated responses, but the 'final distillation' of a prospective juror's voir dire which determines whether a juror is qualified to serve."[45]

b. Peremptory Challenges

A peremptory challenge is "a request from a party that a judge not allow a certain prospective juror to be a member of the jury."[46] In all death penalty cases, the defendant and the state may each peremptorily challenge fifteen jurors.[47] The number of peremptory challenges allotted to the defendant does not increase if s/he is indicted for more than one charge.[48]

The use of a peremptory challenge does not require any sort of justification or cause[49] unless the state or defense believes that the other party is engaging in purposeful discrimination on the grounds of race[50] or gender.[51] If the state or defense believes that jurors are being struck from the jury based on their race or gender, the party opposing the strike may challenge the use of the peremptory challenge.[52] In order to block the strike, the opposing party must establish a *prima facie* case of racial or gender discrimination.[53] An "overwhelming pattern of strikes [against jurors of one race] establishes a *prima facie* inference of racial discrimination."[54] If the opposing party establishes a *prima facie* case, then the other party must provide a race or gender-neutral explanation for the exercise of

---

death penalty simply because defendant had been convicted of murder, and that they could consider a life sentence and could extend mercy if the facts warranted it).

[44] Lance v. State, 560 S.E.2d 663, 671 (Ga. 2002).

[45] Waldrip v. State, 482 S.E.2d 299, 308 (Ga. 1997).

[46] BLACK'S LAW DICTIONARY, *supra* note 35, at 787.

[47] O.C.G.A. § 15-12-165 (2005).

[48] Callahan v. State, 194 S.E.2d 431, 433 (Ga. 1972); s*ee also* McMichen v. State, 458 S.E.2d 833 n.40 (Ga. 1995) (finding that trial court did not abuse its discretion by denying defendant's motion for additional peremptory strikes in capital case); Frazier v. State, 362 S.E.2d 351, 357 (Ga. 1987) (stating that murder defendant was not entitled to additional peremptory challenges above 20 granted by statute).

[49] Gamble v. State, 357 S.E.2d 792, 793 (Ga. 1987).

[50] Batson v. Kentucky, 476 U.S. 79, 89 (1985) (finding that the "Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race"); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that a "criminal defendant may not engage in purposeful discrimination on the ground of race in the exercise of peremptory challenges").

[51] J.E.B. v. Alabama, 511 U.S. 127, 141-43 (1994) (finding that the right of individual jurors to have nondiscriminatory jury selections procedures extends to both men and women); Shell v. State, 591 S.E.2d 450, 451 (Ga. Ct. App. 2003) (noting that the three-part test for *Batson* claims applies to challenges based on gender).

[52] *Batson*, 476 U.S. at 89 (finding that prosecution may not engage in race discrimination); *McCollum,* 505 U.S. at 59 (finding that defendant may not engage in racial discrimination); Chandler v. State, 467 S.E.2d 562, 563-64 (Ga. 1996) (involving the prosecution opposing strikes based on *McCollum* and *J.E.B.*)

[53] *Batson*, 476 U.S. at 89; *Gamble*, 357 S.E.2d at 793; *Chandler*, 467 S.E.2d at 563-64.

[54] Ford v. State, 423 S.E.2d 245, 246 (Ga. 1992).

the challenge.[55] The explanation "need not rise to the level justifying exercise of a challenge for cause,' but it must be 'neutral,' 'related to the case to be tried,' and a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges."[56] The judge must then assess whether the opposing party has established a discriminatory intent.

3. Appellate Review of *Voir Dire*

The judge's control of the scope of *voir dire* and his/her determination as to whether a prospective juror is qualified to serve are both reviewed under an abuse of discretion standard.[57] However, when reviewing a judge's determination on the party's motivation for the peremptory challenge, the reviewing court must use a clearly erroneous standard.[58]

B. The Pattern Jury Instructions and Case Law Interpretation of the Instructions

Upon the conclusion of evidence and arguments in the penalty phase of a capital felony trial, the judge must give the jury "appropriate instructions" at which time it will retire to determine the defendant's punishment.[59] The Council of Superior Court Judges of Georgia[60] publishes the "Georgia Suggested Pattern Jury Instructions—Criminal Cases" ("pattern jury instructions")[61] "to assist the judge" with "objectively and clearly explaining to the jury the issues of fact . . . and the applicable law which governs the facts" with the caveat that "no suggested charges can cover every situation and the task will ever belong to the [] judge to tailor the charged material to the case on trial."[62] As a result, section 5-5-24(b) of the O.C.G.A. permits the state and defense to help the judge tailor the pattern instructions or design new instructions for a particular case by requesting in writing that the judge instruct the jury on certain aspects of the law.[63] The written requests must be submitted to the judge "at the close of the evidence or at such earlier time during the trial as the court reasonably directs" and copies of the requests must be given to opposing counsel.[64] The judge has discretion to grant or deny any written requests for specific jury instructions.[65]

---

[55] *Id.*; *Batson*, 476 U.S. at 89.
[56] *Gamble*, 357 S.E.2d at 795; Shelton v. State, 572 S.E.2d 401, 404 (Ga. 2002).
[57] Gissendaner v. State, 532 S.E.2d 677, 686 (Ga. 2000) (citing Barnes v. State, 496 S.E.2d 674 (Ga. 1998)); Greene v. State, 485 S.E.2d 741, 743 (Ga. 1997).
[58] Shelton v. State, 572 S.E.2d 401, 404 (Ga. Ct. App. 2002)
[59] O.C.G.A. § 17-10-2(c) (2004).
[60] The Council of Superior Court Judges of Georgia was established in 1985 to "further the improvement of the superior courts and the administration of justice." *See* O.C.G.A. § 15-6-34(b) (2004).
[61] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) p. vii. (3d ed. 2003).
[62] *Id.*
[63] O.C.G.A. § 5-5-24(b) (2004).
[64] *Id.*
[65] *Id.*

The following sections will provide an overview of the current pattern jury instructions. This overview will be followed by an in-depth description of certain portions of the pattern jury instructions, combined with a discussion of the interpretation and application of the jury instructions, including which instructions may be given and which must be given.

1. The Application of the Pattern Jury Instructions

The offenses of aircraft hijacking,[66] treason,[67] murder,[68] rape,[69] armed robbery,[70] and kidnapping for ransom or where the victim is harmed[71] statutorily are punishable by death.

---

[66] The crime of aircraft hijacking is prescribed at section 16-5-44 of the O.C.G.A., which states as follows:

> (a) A person commits the offense of hijacking an aircraft when he (1) by use of force or (2) by intimidation by the use of threats or coercion places the pilot of an aircraft in fear of immediate serious bodily injury to himself or to another and causes the diverting of an aircraft from its intended destination to a destination dictated by such person.
> (b) The offense of hijacking is declared to be a continuing offense from the point of beginning, and jurisdiction to try a person accused of the offense of hijacking shall be in any county of this state over which the aircraft is operated.
> (c) A person convicted of the offense of hijacking an aircraft shall be punished by death or life imprisonment.

O.C.G.A. § 16-5-44 (2004).

[67] The crime of treason is codified at section 16-11-1 of the O.C.G.A., which states as follows:

> (a)A person owing allegiance to the state commits the offense of treason when he knowingly levies war against the state, adheres to her enemies, or gives them aid and comfort. No person shall be convicted of the offense of treason except on the testimony of two witnesses to the same overt act or on confession in open court. When the overt act of treason is committed outside this state, the person charged therewith may be tried in any county in this state.
> (b) A person convicted of the offense of treason shall be punished by death or by imprisonment for life or for not less than 15 years.

O.C.G.A. § 16-11-1 (2004).

[68] The crime of murder is codified at section 16-5-1 of the O.C.G.A., which states as follows:

> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
> (b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.
> (c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.
> (d) A person convicted of the offense of murder shall be punished by death or by imprisonment for life.

O.C.G.A. § 16-5-1 (2004).

Both state and federal case law, however, have prohibited the imposition of the death penalty for the offenses of armed robbery, rape, and kidnapping for ransom or with bodily injury where the victim is not killed.[72] The only offenses that are, standing alone,

---

[69] Georgia's rape statute, section 16-6-1 of the O.C.G.A., states as follows:

(a) A person commits the offense of rape when he has carnal knowledge of:
(1) A female forcibly and against her will; or
(2) A female who is less than ten years of age.

Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.
(b) A person convicted of the offense of rape shall be punished by death, by imprisonment for life without parole, by imprisonment for life, or by imprisonment for not less than ten nor more than 20 years. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.
(c) When evidence relating to an allegation of rape is collected in the course of a medical examination of the person who is the victim of the alleged crime, the law enforcement agency investigating the alleged crime shall be responsible for the cost of the medical examination to the extent that expense is incurred for the limited purpose of collecting evidence.

O.C.G.A. § 16-6-1 (2004).

[70] Georgia's armed robbery statute, section 16-8-41of the O.C.G.A., in pertinent part, states as follows:

(a) A person commits the offense of armed robbery when, with intent to commit theft, he or she takes property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon. The offense of robbery by intimidation shall be a lesser included offense in the offense of armed robbery.
(b) A person convicted of the offense of armed robbery shall be punished by death or imprisonment for life or by imprisonment for not less than ten nor more than 20 years.

O.C.G.A. § 16-8-41 (2004).

[71] Georgia's kidnapping statute, section 16-5-40 of the O.C.G.A., states as follows:

(a) A person commits the offense of kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.
(b) A person convicted of the offense of kidnapping shall be punished by imprisonment for not less than ten nor more than 20 years, provided that a person convicted of the offense of kidnapping for ransom shall be punished by life imprisonment or by death and provided, further, that, if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death. Any person convicted under this Code section shall, in addition, be subject to the sentencing and punishment provisions of Code Sections 17-10-6.1 and 17-10-7.

O.C.G.A. § 16-5-40 (2004).

[72] *See* Coker v. Georgia, 433 U.S. 584, 591 (1977); Eberheart v. Georgia, 433 U.S. 917 (1977); Collins v. State, 236 S.E.2d 759, 760 (Ga. 1977); Jarrell v. State, 216 S.E.2d 258, 270 (Ga. 1975); Gregg v. State, 210 S.E.2d 659, 667 (Ga. 1974); Floyd v. State, 210 S.E.2d 810, 814 (Ga. 1974); Eberheart v. State, 206 S.E.2d 12, 18 (Ga. 1974); *see also* Sears v. State, 514 S.E.2d 426, 434 (Ga. 1999) (upholding a sentence of death for the offense of kidnapping with bodily injury where the victim was killed); Moore v. State, 243 S.E.2d 1, 11 (Ga. 1978) (upholding a sentence of death for the offense of rape where the victim was killed); Stanley

punishable by death are aircraft hijacking, treason, and murder. The most recent pattern jury instructions only contain instructions for death penalty cases involving the offense of murder.[73]

The instructions begin with an explanation of the bifurcated nature of a capital trial—guilt/innocence phase and the penalty phase—and describe the jury's role during each phase.[74] The instructions designate that the jury must determine the "guilt or innocence of the [defendant]" during the guilt/innocence phase and, if the jury finds the defendant guilty of murder, it then must determine, during the penalty phase, whether to sentence the defendant to death, life imprisonment without parole, or life imprisonment.[75] The instructions direct the jury to "consider [when assessing the defendant's punishment] all evidence [including victim impact evidence] received . . . in court (in both stages of [the] proceeding) . . . and the facts and circumstances, if any in extenuation, mitigation, and aggravation of punishment."[76] The instructions list all statutory aggravating circumstances for the offense of murder and indicate that before the jury deliberates, the judge may provide them with "a written copy of the[] statutory instructions regarding statutory aggravating circumstances."[77]

The instructions provide for the imposition of a sentence of death or life without parole only if the jury finds beyond a reasonable doubt the existence of one or more aggravating circumstances.[78] The instructions also explain that even if the jury finds one or more aggravating circumstances, it may still impose a sentence of life imprisonment for any or no reason.[79]

The instructions inform the jury that it "may return any one of the three verdicts as to penalty . . . life imprisonment, life imprisonment without parole, or death."[80] The instructions require the verdict to be unanimous and in writing, dated and signed by the jury foreperson and returned and read in open court.[81] In order to impose a sentence of death or life imprisonment without parole, the instructions require the jury to set out in

---

v. State, 241 S.E.2d 173, 180 (Ga. 1977) (upholding a sentence of death for the offense of kidnapping with bodily injury where the victim was killed).

[73] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.20, at 64 (3d ed. 2003).

[74] *Id.* at 65.

[75] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) §§ 2.04.20, 2.04.30, at 65-66 (3d ed. 2003).

[76] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.30, at 65-66 (3d ed. 2003).

[77] *Id.* at 70-71.

[78] *Id.* at 66.

[79] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.50, at 72 (3d ed. 2003).

[80] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.60, at 73 (3d ed. 2003).

[81] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.80, at 75 (3d ed. 2003).

writing the aggravating circumstances found beyond a reasonable doubt and then fix the sentence at either life imprisonment without parole or death.[82]

2. Mitigating Circumstances

a. Pattern Jury Instructions

The instructions advise the jury that when determining the defendant's punishment, it must consider "the facts and circumstances, if any, in extenuation[][and] mitigation . . . of punishment."[83] The instructions describe "mitigating or extenuating circumstances" as "[circumstances that] do not constitute a justification or excuse for the offense in question but that, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame."[84]

b. Case Law Interpretation of the Definition and Use of the Terms Mitigation and Mitigating Circumstances

"Mitigation" is a term of "common usage and meaning;" therefore, judges do not have to define the term in their instructions.[85] Similarly, judges do not have to use the term "mitigating circumstances" in their instructions as long as a "reasonable juror" would have understood from the charged instructions "the meaning and function of mitigating evidence."[86]

c. Case Law Interpretation of the Identification and Consideration of Specific Mitigating Circumstances

Judges are not required to and may reject any requests by the defendant to identify in the jury instructions specific mitigating circumstances present in the defendant's case,[87]

---

[82] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) §§ 2.04.62, 2.04.63, at 73-74 (3d ed. 2003).

[83] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.30, at 65 (3d ed. 2003).

[84] *Id.* at 66.

[85] Smith v State, 290 S.E.2d 43, 45 (Ga. 1982) (overturned on other grounds); Cape v. State, 272 S.E.2d 487, 493 (Ga. 1980); Watkins v. State, 426 S.E.2d 26, 29 (Ga. Ct. App. 1992) (citing *Smith*, 290 S.E.2d at 45, for the proposition that terms of common usage and meaning, such as "mitigation," do not need to be specifically defined in the jury charge).

[86] Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986); Goodwin v. Balkcom, 684 F.2d 794, 802-03 (Ga. 1982) (implying that reference to "evidence in mitigation" may be sufficient if the instructions mention the option to impose life imprisonment even though aggravating circumstances are found); Spivey v. State, 246 S.E.2d 288, 291 (Ga. 1978).

[87] *See Cape,* 272 S.E.2d at 493; Bowen v. State, 260 S.E.2d 855, 857 (Ga. 1979) (finding that the judge correctly instructed the jury on mitigating circumstances by stating as follows: "consider the evidence as to mitigating circumstances which the defendant contends exists . . . or any other mitigating circumstances you find from the evidence"); *see also* McPherson v. State, 553 S.E.2d 569, 578 (Ga. 2001); Rhode v. State, 552 S.E.2d 855, 863 (Ga. 2001); Heidler v. State, 537 S.E.2d 44, 56 (Ga. 2000); King v. State, 539 S.E.2d 783, 800 (Ga. 2000); Jenkins v. State, 498 S.E.2d 502, 515 (Ga. 1998).

including residual doubt.[88] Instead of referring to specific mitigating circumstances, judges are only required to do the following: (1) instruct the jury to "consider" mitigating circumstances in general; and (2) inform them that they can impose a sentence of life imprisonment for any reason or no reason at all.[89] Failure to inform the jury that they are authorized to consider mitigating circumstances[90] or that they may impose a sentence of life imprisonment constitutes a ground for setting aside the defendant's death sentence.[91]

d. Case Law Interpretation of the Unanimity of Findings as to Mitigating Circumstances

In cases in which the jury is charged that "it is not necessary to find any mitigating circumstances in order to impose a life sentence," judges are not required to instruct the jury that its findings as to mitigating circumstances need not be unanimous.[92]

3. Aggravating Circumstances

a. Pattern Jury Instructions

The instructions direct the jury to consider "the facts and circumstances, if any, in . . . aggravation of punishment" when determining the defendant's punishment.[93] The instructions describe "aggravating circumstances" as "[circumstances that] increase the guilt or enormity of the offense or add to its injurious consequences."[94] This includes both statutory and non-statutory aggravators.[95]

The jury instructions list all statutory aggravating circumstances for the offense of murder, which differ from the statutory aggravating circumstances enumerated in O.C.G.A.§ 17-10-30, as § 17-10-30 refers to all capital offenses in Georgia--not just murder. The statutory aggravating circumstances listed in the instructions are as follows:

1. Where the offense of murder was committed by a person with a prior record of conviction for a capital felony. In this connection, I charge you that the offense of (Enter offense) is a capital felony under our law (O.C.G.A.§ 17-10-30(b)(1));

---

[88] *McPherson*, 553 S.E.2d at 578; *Rhode*, 552 S.E.2d at 863; *Heidler*, 537 S.E.2d at 56; *Jenkins*, 498 S.E.2d at 515.

[89] *McPherson*, 553 S.E.2d at 578; *Heidler*, 537 S.E.2d at 56; *King,* 539 S.E.2d at 801.

[90] Hawes v. State, 240 S.E.2d 833, 839 (Ga. 1977).

[91] *Id.* (citing Fleming v. State, 240 S.E.2d 37, 41 (Ga. 1977)).

[92] Wilson v. State, 525 S.E.2d 339, 347 (Ga. 1999); Palmer v. State, 517 S.E.2d 502, 506 (Ga. 1999); McClain v. State, 477 S.E.2d 814, 824 (Ga. 1996).

[93] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.30, at 66 (3d ed. 2003).

[94] *Id.*

[95] Thornton v. State, 449 S.E.2d 98, 113 (Ga. 1994) (noting that the jury may consider non-statutory aggravating circumstances, citing Lee v. State, 365 S.E.2d 99 (Ga. 1988), and Zant v. Stephens, 297 S.E.2d 1 (Ga. 1982)).

2. Where the offense of murder was committed while the defendant was engaged in the commission of another capital felony (or aggravated battery). In this connection, I charge you that the offense of (Enter offense) is a capital felony under our law (O.C.G.A.§ 17-10-30(b)(2));
3. Where the offense of murder was committed while the defendant was engaged in the commission of a burglary or arson in the first degree (O.C.G.A.§ 17-10-30(b)(2));
4. Where the defendant, by the act of murder, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person (Ga. Code Ann. § 17-10-30(b)(3));
5. Where the defendant committed the offense of murder for himself/herself, or another, for the purpose of receiving money or any other thing of monetary value (O.C.G.A.§ 17-10-30(b)(4));
6. Where the murder is of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor, during, or because of, the exercise of official duty (O.C.G.A.§ 17-10-30(b)(5));
7. Where the defendant caused or directed another to commit murder or committed murder as an employee of another person (O.C.G.A.§ 17-10-30(b)(6));
8. Where the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved:
   a. Depravity of mind; or
   b. Torture to the victim prior to the death of the victim; or
   c. Aggravated battery to the victim prior to the death of the victim

   (O.C.G.A.§ 17-10-30(b)(7));
9. Where the offense of murder was committed against any:
   a. Peace officer;
   b. Corrections employee; or
   c. Fireman,

   while engaged in the performance of official duties (O.C.G.A.§ 17-10-30(b)(8));
10. Where the offense of murder was committed by a person:
    a. In the lawful custody of a peace officer;
    b. In a place of lawful confinement;
    c. Who has escaped from:
       i. The lawful custody of a peace officer;
       ii. A place of lawful confinement

    (O.C.G.A.§ 17-10-30(b)(9)); and
11. Where the murder was committed for the purpose of avoiding, interfering with, or preventing:
    a. A lawful arrest;
    b. Custody in a place of lawful confinement, of the defendant or another person

(O.C.G.A.§ 17-10-30(b)(10)).[96]

Although the pattern instructions include all statutory aggravating circumstances relevant to the offense of murder, the judge may charge the jury only on those statutory aggravators applicable to the case.[97] In cases in which the "outrageously or wantonly vile, horrible, or inhuman" circumstance is applicable, the jury instructions provide definitions for "aggravated battery,"[98] "torture,"[99] and "depravity of the mind."[100]

b. Case Law Interpretation of the Aggravating Circumstances

i. Aggravating Circumstance #1: Murder Committed by a Person With a Prior Record of Conviction for a Capital Felony

The term "capital felonies" includes "felonies which were capital crimes in Georgia at the time . . . [the] death penalty statute was enacted in 1973, even as to those offenses for which the death penalty may, as a result of judicial construction, no longer be imposed."[101] This includes murder, treason, aircraft hijacking, rape, armed robbery, and kidnapping for ransom or with bodily injury.

In determining whether the defendant has a "prior record of conviction for a capital felony," the jury must consider the defendant's record at the time of sentencing, not at the time of the crime.[102] The age of the conviction is not a ground for excluding its consideration, but it is a fact that the defense may argue in mitigation.[103]

---

[96] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.30, at 67-70 (3d ed. 2003).

[97] *Id.*

[98] "Aggravated battery occurs when a person maliciously causes bodily harm to another by depriving that person of a part of body, by rendering a part of the person's body useless, or by seriously disfiguring the person's body or a body part. In order to find that the offense of murder involved aggravated battery, you must find that the bodily harm to the victim occurred before death." *Id.* at 68.

[99] "Torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish. Besides serious physical abuse, torture includes serious sexual abuse or the serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. You would not be authorized to find that the offense of murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. In order to find that the offense of murder involved torture, you must find that the defendant intentionally, unnecessarily, and wantonly inflicted severe physical or mental pain, agony, or anguish upon a living victim." *Id.*

[100] "Depravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind. In determining whether the offense of murder in this case involved depravity of mind on the part of the defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to and after the commission of the murder. In order to find that the offense of murder involved depravity of mind, you must find that the defendant, as the result of utter corruption, perversion, or immorality, committed aggravated battery or torture upon a living person, or subjected the body of a deceased victim to mutilation or serious disfigurement or sexual abuse." *Id.* at 69.

[101] Waters v. State, 283 S.E.2d 238, 251 (Ga. 1981) (referring to (b)(2)).

[102] State v. Terry, 360 S.E.2d 588, 589 (Ga. 1987); Stephens v. Hopper, 247 S.E.2d 92, 97 (Ga. 1978).

[103] Cook v. State, 340 S.E.2d 843, 854 (Ga. 1986).

ii. Aggravating Circumstance #2: Murder Committed While Defendant Was Engaged in the Commission of Another Capital Felony or Aggravating Battery

The murder and the "other capital felony" or aggravated battery do not have to occur simultaneously as long as the offenses occur within a "relatively short period of time in what can be fairly viewed as one continuous course of criminal conduct"[104] or as part of an "overall [criminal] plan."[105] The "other capital felony" or aggravated battery need not be completed nor does the defendant have to be charged with or convicted of the offense.[106] The "other capital felony" may be murder or any other statutorily defined capital felony.[107] The murder victim and the victim of the "other capital felony" or aggravated battery do not have to be the same individual.[108]

iii. Aggravating Circumstance #3: Murder Committed While Defendant Was Engaged in the Commission of Burglary or First-degree Arson

A thorough and exhaustive review of the relevant Georgia case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

iv. Aggravating Circumstance #4: The Defendant, by the Act of Murder, Knowingly Created a Great Risk of Death to More Than One Person in A Public Place by Means of a Weapon or Device That Would Normally Be Hazardous to the Lives of More Than One Person

The Georgia Supreme Court has interpreted three aspects of this aggravating circumstance: (1) the meaning of "knowingly," (2) the meaning of "great risk", and (3) the meaning of weapon. The terms "knowingly" and "great risk" are "terms of common usage and meaning" and, as a result, do not have to be defined in the jury instructions.[109] The Court, in *Harrison v. State*, however, clarified that the term "knowingly" pertains to the creation of the "great risk of death" not to commission of the act of murder.[110] Lastly, the Court, in *Jones v. State*, classified a .32 caliber automatic weapon as the type of weapon that would normally be hazardous to the lives of more than one person when used in a public place.[111]

---

[104] Sallie v. State, 78 S.E.2d 444, 454 (Ga. 2003); Gilreath v. State, 279 S.E.2d 650, 670-71 (Ga. 1981).
[105] *Sallie*, 578 S.E.2d at 454; Strickland v. State, 275 S.E.2d 29, 40 (Ga. 1981).
[106] Amadeo v. State, 255 S.E.2d 718, 721 (Ga. 1979) (citing Moore v. State, 213 S.E.2d 829 (Ga. 1978)).
[107] Romine v. State, 305 S.E.2d 93, 99 (Ga. 1983).
[108] *Sallie*, 578 S.E.2d at 454.
[109] Philpot v. State, 486 S.E.2d 158, 161 (Ga. 1997).
[110] Harrison v. State, 361 S.E.2d 149, 151-53 (Ga. 1987).
[111] Jones v. State, 256 S.E.2d 907, 916 (Ga. 1979); *see also* Chenault v. State, 215 S.E.2d 223, 225 (Ga. 1975) (stating that an undisclosed type of concealed weapon constitutes the type of weapon that is normally

v. Aggravating Circumstance #5: Defendant Committed Murder for Himself/Herself or Another for the Purpose of Receiving Money or Any Other Thing of Monetary Value

This aggravating circumstance refers to the "motive" for the murder.[112] This motive must be for pecuniary gain[113] and it must manifest itself prior to the actual killing.[114] For example, in *Baxter v. State,* the Georgia Supreme Court found that because the defendant "left [the] motel room [on the night of the murder] . . . in search of a 'money making thing'" the evidence was sufficient to uphold a finding of this aggravating circumstance.[115]

"Any other thing of monetary value" has been interpreted as being the proceeds of a life insurance policy on the victim,[116] an automobile,[117] and a credit card.[118]

vi. Aggravating Circumstance #6: Murder of a Former or Current Judicial Officer and/or Other Government Agents

A thorough and exhaustive review of the relevant Georgia case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

vii. Aggravating Circumstance #7: Defendant Caused or Directed Another to Commit Murder or Committed Murder as an Employee of Another Person

This aggravating circumstance applies to individuals who cause or direct a "follower or lackey" to commit murder, even if the murder is not for hire.[119] It also applies to murders for hire to both the "hirer and the one hired" ("agent" and "employee").[120] The terms "agent" and "employee" can be defined by the following "common, everyday meanings:" "An employee is one who is hired by another and an agent is one who acts for

---

hazardous to the lives of more than one person, when used in a public place); Jarrell v. State, 216 S.E.2d 258, 269 (Ga. 1975); Phillips v. State, 297 S.E.2d 217, 219 (Ga. 1982).

[112] Simpkins v. State, 486 S.E.2d 833, 835 (Ga. 1997).

[113] *Id.*; *see also* Tarver v. State, 602 S.E.2d 627, 630 (Ga. 2004).

[114] Young v. Zant, 506 F. Supp. 274, 280-81 (M.D. Ga. 1980) (overturned on other grounds).

[115] Baxter v. State, 331 S.E.2d 561, 572-73 (Ga. 1985); *see also Young*, 506 F. Supp. at 280-81 (ordering that the defendant be resentenced, finding that the evidence failed to prove beyond a reasonable doubt that the defendant intended to rob the victim as the defendant did not contemplate taking the victim's wallet and attempting to obtain money until after he killed the victim).

[116] Fugitt v. State, 307 S.E.2d 471 (Ga. 1983).

[117] Jarrell v. State, 216 S.E.2d 258, 269 (Ga. 1975).

[118] Miller v. State, 380 S.E.2d 690, 692 (Ga. 1989).

[119] Mize. v. State, 501 S.E.2d 219, 230-31 (Ga. 1998).

[120] Castell v. State, 301 S.E.2d 234, 250 (Ga. 1983).

another."[121] Motivating another person to kill someone does not create an agent-employee relationship.[122] The agent must actually hire the individual as his/her employee.[123]

viii. Aggravating Circumstance #8: The Offense of Murder Was "Outrageously or Wantonly Vile, Horrible, or Inhuman" in That it Involved Depravity of the Mind, or Torture Prior to the Death of the Victim, or Aggravated Battery to the Victim Prior to the Death of the Victim

This aggravating circumstance has been interpreted as having two major components: (1) the offense of murder was outrageously or wantonly vile, horrible, or inhuman, and (2) it involved (a) aggravated battery to the victim, OR (b) torture to the victim, OR (c) depravity of mind of the defendant.[124] In order for the jury to find the existence of this aggravating circumstance, the evidence must satisfy the first major component and at least one of the sub-parts of the second major component.[125]

The phrases "outrageously or wantonly vile" and "horrible or inhuman" are phrases of "ordinary significance" that have been found to have "essentially" the same meaning and are intended only to distinguish "ordinary murders" (for which the death penalty may not be imposed) from capital murders (for which the death penalty may be imposed).[126] Because the phrases are of "ordinary significance," judges are not required to provide definitions.[127]

An aggravated battery, however, is not a term of ordinary meaning and as a result, must be explained as follows: "[aggravated battery may be found when the defendant] maliciously causes bodily harm to another individual by depriving him[/her] of a member of his[/her] body, or by rendering a member of his[/her] body useless, or by seriously disfiguring his[/her] body or a member thereof."[128] Torture—a term of common meaning—may be found where the defendant "intentionally, unnecessarily, and wantonly" inflicts upon the victim serious physical abuse, sexual abuse, or psychological abuse "where it is shown to have resulted in severe mental anguish to the victim in

---

[121] *Id.*
[122] Whittington v. State, 313 S.E.2d 73, 81-83 (Ga. 1984).
[123] *Id.*
[124] Patrick v. State, 274 S.E.2d 570, 571-72 (Ga. 1981) (citing Hance v. State, 268 S.E.2d 339 (Ga. 1980)).
[125] *Id.* at 572. A jury finding beyond a reasonable doubt that the murder was merely "horrible or in human, in that it involved torture" of the victim, is not tantamount to a jury properly finding the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture." *See* Perkinson v. State, 610 S.E.2d 533, 541 (Ga. 2005).
[126] *Hance,* 268 S.E.2d at 339 (citing Godfrey v. Georgia, 446 U.S. 420 (1980)); Tarver v. State, 602 S.E.2d 627, 630 (Ga. 2004); *Patrick*, 274 S.E.2d at 571-72.
[127] Gilreath v. State, 279 S.E.2d 650, 670 (Ga. 1981).
[128] *Hance,* 268 S.E.2d at 339; West v. State, 313 S.E.2d 67, 69-72 (Ga. 1984); *Gilreath*, 279 S.E.2d at 670.

anticipation of death."[129] Only facts occurring before the victim's death are relevant to a finding of aggravated battery and torture.[130] A victim who was mutilated after death or dies instantaneously has not been subjected to aggravated battery or torture.[131]

"Depravity of mind" is "an utterly corrupt, perverted, or immoral state of mind."[132] Such definition, however, need not be included in the jury instructions because it is "common" and is subject to a "common understanding."[133] In determining depravity of mind on the part of the defendant, the jury may consider the age and physical characteristics of the victim and any actions committed by the defendant against the victim both before and after the victim's death.[134] The following acts committed against the victim may be found to show depravity of mind: (1) mutilation or serious disfigurement after death;[135] (2) sexual abuse after death; [136] (3) serious psychological abuse before death;[137] (4) aggravated battery before death; and (5) torture before death.[138]

ix. Aggravating Circumstance #9: Murder of a Police Officer or Corrections Employee or a Firefighter

A thorough and exhaustive review of the relevant Georgia case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

---

[129] *Hance,* 268 S.E.2d at 339; High v. State, 276 S.E.2d 5, 13-14 (Ga. 1981); Whittington v. State, 313 S.E.2d 73, 81-83 (Ga. 1984); Justus v. State, 276 S.E.2d 242, 245 (Ga. 1981) (stating that "[s]erious sexual abuse may be found to constitute serious physical abuse"); Thomas v. State, 275 S.E.2d 318, 319 (Ga. 1981).

[130] *Patrick*, 274 S.E.2d at 571-72 (citing *Hance*, 268 S.E.2d at 339).

[131] *Id.* (vacating the defendant's death sentence by finding that the evidence failed to show beyond a reasonable doubt that the aggravated battery occurred prior to death; the court stated as follows: "A victim who dies instantaneously from the first [of three] blow[s] [to the scalp area of the head] cannot be subjected to an aggravated battery."); Cervi v. State, 282 S.E.2d 629, 636 (Ga. 1981) (torture); *Hance*, 268 S.E.2d at 339.

[132] Tarver v. State, 602 S.E.2d 627, 630 (Ga. 2004); *Whittington*, 313 S.E.2d at 81-83; *West*, 313 S.E.2d at 69-72.

[133] *West*, 313 S.E.2d at 69-72.

[134] *Id.*; Brown v. State, 326 S.E.2d 735, 736 (Ga. 1985).

[135] Fair v. State, 268 S.E.2d 316, 325 (Ga. 1980); *Hance,* 268 S.E.2d at 339.

[136] *Hance,* 268 S.E.2d at 339; Thomas v. State, 275 S.E.2d 318, 319 (Ga. 1981); Cape v. State, 272 S.E.2d 487, 493 (Ga. 1980); Justus v. State, 276 S.E.2d 242, 245 (Ga. 1981).

[137] *Whittington*, 313 S.E.2d at 81-83 (citing Phillips v. State, 297 S.E.2d 218, 221 (Ga. 1982)); High v. State, 276 S.E.2d 5, 13-14 (Ga. 1981); *Brown*, 326 S.E.2d at 736.

[138] Tarver v. State, 602 S.E.2d 627, 630 (Ga. 2004); *Thomas*, 275 S.E.2d at 319. However, "mere apprehension of death, immediately before the fatal wounds are inflicted by the defendant, does not constitute the psychological abuse sufficient to show depravity of mind." Riley v. State, 604 S.E.2d 488, 499 (Ga. 2004).

x. Aggravating Circumstance #10: Murder While in Custody or After Escape from Lawful Custody

A thorough and exhaustive review of the relevant Georgia case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

xi. Aggravating Circumstance #11: Murder Committed for the Purpose of Avoiding, Interfering With, or Preventing a Lawful Arrest or Lawful Detainment

A thorough and exhaustive review of the relevant Georgia case law has not revealed a judicial interpretation of this aggravating circumstance at the time of the release of this report.

c. Case Law Interpretation of Future Dangerousness as a Non-Statutory Aggravating Circumstance

Both the state and defense may present arguments on the issue of the defendant's future dangerousness during the sentencing phase of a capital trial.[139] A defendant's future dangerousness may be addressed by referencing the defendant's "past criminal conduct, his age, and the circumstances surrounding the crime for which he is being sentenced."[140] Where the state makes an issue of the defendant's future dangerousness during the sentencing phase and state law prohibits the defendant's release on parole, the jury must be informed that the defendant is ineligible for parole.[141]

d. Case Law Interpretation of the Burden of Proof and Unanimity of Finding as to Statutory and Non-Statutory Aggravating Circumstances

The jury instructions require the jury to find "beyond a reasonable doubt" at least one or more "statutory aggravating circumstances" in order to impose a sentence of death or life imprisonment without parole.[142]

The Georgia Supreme Court has found that judges are required to charge the jury on the burden of proof applicable to statutory aggravating circumstance, but are not required to

---

[139] Presnell v. State, 551 S.E.2d 723, 733 (Ga. 2001); Jones v. State, 539 S.E.2d 154, 159 (Ga. 2000); Johnson v. State, 519 S.E.2d 221, 231 (Ga. 1999); Pye v. State, 505 S.E.2d 4, 13-14 (Ga.1998); Hammond v. State, 452 S.E.2d 745, 752 (Ga. 1995) (citing Vance v. State, 416 S.E.2d 516 (1992)); Hicks v. State, 352 S.E.2d 762, 777 (Ga. 1987).

[140] Walker v. State, 327 S.E.2d 475, 481 (Ga. 1985).

[141] Philpot v. State, 486 S.E.2d 158, 161 (Ga. 1997) (citing Simmons v. South Carolina, 512 U.S. 154 (1994)).

[142] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.30, p. 66 (3d ed. 2003).

provide such information for non-statutory aggravating circumstances.[143] Similarly, judges are not required to instruct the jury that its finding as to an aggravating circumstance must be unanimous as long as the judge instructs the jury that its sentencing verdict must be unanimous.[144]

e. Case Law Interpretation of Whether Aggravating Circumstances Must Be Set Forth in Writing

The jury instructions require the jury to "set out in writing the aggravating circumstance that you may find to exist beyond a reasonable doubt."[145]

The Georgia Supreme Court has found that the jury's written finding as to aggravating circumstances must show "the jury's intent 'with sufficient clarity that [the] court can rationally review the jury's findings.'"[146] A verdict that "completely omits an essential element of a statutory aggravating circumstance" would not suffice as a finding of that statutory aggravating circumstance.[147]

4. Availability and Definitions of the Sentencing Options

a. Pattern Jury Instructions

The pattern jury instructions not only explain the specific circumstances under which the jury may impose any of the three sentencing options—death, life imprisonment without parole, and life imprisonment—the instructions also define "life imprisonment without parole" and "life imprisonment."

The instructions state, "a sentence of death or life imprisonment without parole shall not be imposed unless the jury first finds beyond a reasonable doubt and designates in its verdict in writing at least one or more statutory aggravating circumstances."[148] The instructions also explain that life imprisonment may be imposed under the following circumstances:

> Whether or not you find any extenuating or mitigating facts or circumstances, you are authorized to fix the penalty in this case at life imprisonment.

---

[143] Wilson v. State, 525 S.E.2d 339, 347 (Ga. 1999) (citing Cromartie v. State, 514 S.E.2d 205, 214-15 (Ga. 1999); Speed v. State, 512 S.E.2d 896, 908 (Ga. 1999); Whatley v. State, 509 S.E.2d 45, 51 (Ga. 1998); McClain v. State, 477 S.E.2d 814, 824 (Ga. 1996); Ward v. State, 417 S.E.2d 130, 137 (Ga. 1992); Ross v. State, 326 S.E.2d 194, 203-04 (Ga. 1985).

[144] Sallie v. State, 578 S.E.2d 444, 452 (Ga. 2003); Lance v. State, 560 S.E.2d 663, 678 (Ga. 2002).

[145] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) §§ 2.04.62, 2.04.63, at 73-74 (3d ed. 2003).

[146] Page v. State, 345 S.E.2d 600, 603 (Ga. 1986).

[147] Black v. State, 410 S.E.2d 740, 745-46 (Ga. 1991).

[148] GA. SUGGESTED PATTERN JURY INSTRUCTIONS VOL. II (CRIMINAL CASES) § 2.04.30, at 66 (3d ed. 2003).

. . . .

> If you should find from the evidence in this case, beyond a reasonable doubt, the existence of one or more statutory aggravating circumstances as given you in charge by the court, you would also be authorized to sentence the defendant to life imprisonment.
>
> You may fix the penalty at life imprisonment . . . for any reason satisfactory to you or without any reason.[149]

The instructions provide the following meanings for "life imprisonment" and "life imprisonment without parole":

> Life imprisonment means the defendant will be sentenced to incarceration for the remainder of his/her natural life; however s/he will be eligible for parole during the term of that sentence;[150] and
> Life imprisonment without parole means the defendant shall be incarcerated for the remainder of his/her natural life and shall not be eligible for parole.[151]

b. Case Law Interpretation of the Availability of Life Imprisonment When Aggravating Circumstances Are Found

The Georgia Supreme Court has found that judges are required to instruct the jury clearly and explicitly that they could recommend a sentence of life imprisonment even if they found the existence of at least one aggravating circumstance.[152] Failure to do so constitutes a ground for vacating a defendant's death sentence.[153]

c. Case Law Interpretation of the Meaning of Life Imprisonment Without Parole ("Life Without Parole") and Life Imprisonment

---

[149] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.50, at 72 (3d ed. 2003).

[150] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.61, at 73 (3d ed. 2003).

[151] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.62, at 73 (3d ed. 2003).

[152] *See* Thornton v. State, 449 S.E.2d 98, 114 (Ga. 1994); Romine v. State, 305 S.E.2d 93, 100 (Ga. 1983); Spraggins v. State, 243 S.E.2d 20, 23 (Ga. 1978); Fleming v. State, 240 S.E.2d 37, 41 (Ga. 1977); Hawes v. State, 240 S.E.2d 833, 840 (Ga. 1977).

[153] *Fleming*, 240 S.E.2d at 41; *Hawes*, 240 S.E.2d at 840; *Spraggins*, 243 S.E.2d at 23; *see also* Stynchcombe v. Floyd, 311 S.E.2d 828, 830 (Ga. 1984) (finding that the charged instruction failed to include "language explaining to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance;" however, the court found that the defendant was procedurally barred from raising this issue because he was given the opportunity to object to the instruction but failed to do so).

In 1993, the Georgia Legislature adopted section 17-10-31.1(d) of the O.C.G.A., providing for the sentencing option of "life without parole" as an alternate to the death penalty and allowing the state and defense to "present argument[s] and the [] judge [to] instruct the jury" as to the meaning of "life without parole" and "life imprisonment" during the sentencing phase of a capital trial.[154] The Georgia Supreme Court has since interpreted section 17-10-31.1(d) to mean that during the sentencing phase of a capital trial: (1) the state and defense have the option of presenting arguments on the meaning of and appropriateness of[155] "life without parole" and "life imprisonment" and (2) the judge is mandated to instruct the jury on the definitions of "life without parole" and "life imprisonment."[156] The Court has stated on numerous occasions that judges "must,"[157] "are obligated to," [158] and "are required to"[159] instruct the jury on the meaning of and difference between life without parole and life imprisonment during the sentencing phase of a capital trial.

Section 17-10-31.1(d), however, applies only to death penalty cases[160] where the offenses were committed after its effective date (May 1, 1993) or to defendants who elected, in writing, to be sentenced under the statute.[161] Therefore, in death penalty cases heard after the statute's effective date where the offenses were committed prior to the statute's effective date and the defendants did not opt to be sentenced under the new statute, laws in existence prior to the promulgation of section 17-10-31.1(d) apply.[162]

---

[154] O.C.G.A. § 17-10-31.1(d) (2004) (providing definitions for "life without parole" and "life imprisonment"); *see also* GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) §§ 2.04.61, 2.04.62, at 73 (3d ed. 2003).

[155] Lamar v. State, 598 S.E.2d 488, 494 (Ga. 2004).

[156] *See Lamar*, 598 S.E.2d at 494; Zellmer v. State, 534 S.E. 2d 802, 803 (Ga. 2000); Turner v. State, 486 S.E.2d 839, 842 (Ga. 1997); *see also* McClain v. State, 477 S.E.2d 814, 824 (Ga. 1996) (stating that the state and defense "may present argument on the meaning of life without parole, and the trial court may charge the jury on life without parole").

[157] *Lamar,* 598 S.E.2d at 494 (citing O.C.G.A. § 17-10-31.1(d), and referencing *Zellmer*, 534 S.E. 2d at 803).

[158] *Zellmer,* 534 S.E.2d at 803.

[159] *Turner*, 486 S.E.2d at 842.

[160] O.C.G.A. § 17-10-31.1 (noting that this section applies only to death penalty cases, just as "life without parole" is a sentencing option only as an alternate to the death penalty. In all cases where § 17-10-31.1 is inapplicable, the judge is not required to instruct the jury as to the meaning of "life imprisonment" and the issue of parole is inadmissible.); Burgess v. State, 450 S.E.2d 680, 693-94 (Ga. 1994) (stating that *Simmons v. South Carolina,* 512 U.S. 154 (1994), "stands for the relatively narrow proposition that, where the State makes an issue of the defendant's future dangerousness during the sentencing phase of a capital trial and state law prohibits the defendant's release on parole, the jury must be informed that the defendant is ineligible for parole").

[161] 1993 Ga. Laws 569, § 7. A defendant who committed his/her offense before May 1, 1993, may elect to be sentenced under section 17-10-31.1(d) of the O.C.G.A provided that: "(1) jeopardy for the offense charged has not attached and the state has filed with the trial court notice of its intention to seek the death penalty or (2) the defendant has been sentenced to death but the conviction or sentence has been reversed on appeal and the state is not barred from seeking the death penalty after remand." *See id.*

[162] *Id.*

Prior to the adoption of O.C.G.A.§ 17-10-31.1(d), judges were not permitted to instruct juries and the state and defense were prohibited from presenting arguments on the meaning of life imprisonment and the possibility of parole.[163] For example, the Georgia Supreme Court upheld judges' refusals to "answer the jury's request for a definition of 'life imprisonment' in the terms of years in prison"[164] and found that judges should respond to all requests for instructions on the possibility of parole by stating "in no uncertain terms that such matters are not proper for the jury's consideration."[165]

d. Case Law Interpretation of the Admissibility of Information Related to Georgia's Parole Practices

The United States Supreme Court and the Georgia Supreme Court have found that judges are required to instruct a capital jury about the state's parole practices if: (1) the state raises the issue of the defendant's future dangerousness; and (2) Georgia law prohibits the defendant's release on parole.[166] In capital cases where these two requirements are not present, judges may refuse to instruct the jury and allow the defendant to admit evidence regarding the specific minimum amount of time the defendant would have to serve before becoming eligible for parole.[167] For example, in *Jackson v. State*, the Georgia Supreme Court upheld the lower court's order sustaining the state's objection to expert testimony "as to the length of time [the defendant] would spend in prison before he would be eligible for parole (if he were to receive a simple life sentence)."[168]

---

[163] *See* O.C.G.A. § 17-8-76 (2004); Cohen v. State, 361 S.E.2d 373, 375 (Ga. 1987); Quick v. State, 353 S.E.2d 497, 502 (Ga. 1987); Westbrook v. State, 353 S.E.2d 504, 506 (Ga. 1987). *But see* Jenkins v. State, 498 S.E.2d 502, 515 (Ga. 1998) (finding O.C.G.A. § 17-10-31.1 to be the "most recent legislative expression," prevailing over O.C.G.A. § 17-8-76 and, therefore, upholding the court's ruling allowing counsel to address "the possibility of parole" during closing arguments in the sentencing phase); McClain v. State, 477 S.E.2d 814, 824 (Ga.1996) (stating that O.C.G.A. § 17-8-76(a), which prohibits argument on the issue of parole and provided the basis for the holding in *Quick*, 353 S.E.2d at 502, has been overruled by O.C.G.A. § 17-10-31.1, to the extent that counsel for the state and the accused may present argument on the meaning of life without parole, and the trial court may charge the jury on life without parole).

[164] *Cohen,* 361 S.E.2d at 375.

[165] *Quick*, 353 S.E.2d at 502.

[166] Philpot v. State, 486 S.E.2d 158, 161 (Ga. 1997); Burgess v. State, 450 S.E.2d 680, 693-94 (Ga. 1994).

[167] *Philpot,* 486 S.E.2d at 161; Lance v. State, 560 S.E.2d 663, 678 (Ga. 2002) (upholding judge's refusal to "allow evidence regarding the possible timing of Lance's parole eligibility if the jury were to impose a sentence of life imprisonment rather than a sentence of life imprisonment without parole or a sentence of death"); Jackson v. State, 512 S.E.2d 241, 246 (Ga. 1999) (upholding the judge's refusal to provide the following charge: "the fact that a defendant may be eligible for parole during the term of his [life] sentence does not mean that he will be paroled"); Henry v. State, 462 S.E.2d 737, 746 (Ga. 1995) (stating it was not error for the trial court to refuse to instruct the jury that "consecutive life sentences require that a defendant serve a specified minimum [amount] of time for each consecutive count").

[168] *Jackson,* 512 S.E.2d at 246.

5. Victim Impact Evidence

a. Pattern Jury Instructions

The pattern jury instructions indicate that the prosecution may introduce "victim impact evidence" during the sentencing phase of a capital felony trial.[169] The instructions explain the purpose and utility of this evidence as follows:

> This evidence is simply another method of informing you about the alleged harm caused by the crime in question. To the extent that you find that this evidence reflects on the defendant's culpability, you may consider it, but you may not use it as a substitute for proof beyond a reasonable doubt of the existence of a statutory aggravating circumstance.[170]

b. Case Law Interpretation of the Use and Purpose of Victim Impact Evidence

In 1993, the Georgia Legislature adopted section 17-10-1.2(a)(1) of the O.C.G.A. providing that "in all cases in which the death penalty may be imposed . . . the court may allow evidence from the family of the victim, or such other witness having personal knowledge of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community."[171] One year later, the Georgia Supreme Court, in *Livingston v. State*, assessed the constitutionality of section 17-10-1.2(a)(1).[172] The Court upheld section 17-10-1.2(a)(1) and the admissibility of "evidence related to the impact of the offense upon the victim's family or community," reasoning that the statute contains sufficient safeguards to protect against the "imposition of the death penalty due to 'passion, prejudice, or any other arbitrary factor.'"[173] Despite this finding, the *Livingston* court recommended the adoption of an additional safeguard involving the timing of rulings on the admissibility of evidence.[174] The Court specifically held that "the trial court *must* hear and rule prior to trial on the admissibility of victim impact evidence sought to be offered."[175]

Following *Livingston*, the Court noted, in *Turner v. State*, that district attorney offices in many judicial circuits had adopted some form of the following victim impact evidence procedure:

- state provides the victim impact witnesses with questions;

---

[169] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.40, at 71 (3d ed. 2003).
[170] *Id.*
[171] *See* O.C.G.A. § 17-10-1.2(a)(1) (2004).
[172] Livingston v. State, 444 S.E.2d 748, 751-52 (Ga. 1994).
[173] *Id.*
[174] *Id.*
[175] *Id.*

- witnesses prepare a written statement in response to the questions posed by the state;
- state provides the statements to the defense;
- court holds a hearing on the statements providing the defense with an opportunity to object to the content of the statements; and
- during the trial, the state asks each witness its questions and the witnesses respond by reading their statements.[176]

Three years after the decision in *Livingston*, the Court recommended the imposition of two additional safeguards to ensure that the use of victim impact evidence does not result in the arbitrary imposition of the death penalty.[177] In *Turner v. State*, the Court concluded that the state rather that the court should question the victim impact witnesses to "avoid the possibility that the jury might give greater weight to the "court's witnesses" and recommended that the trial court instruct the jury on the purpose of victim impact evidence as included in the aforementioned pattern jury instructions on victim impact evidence.[178]

c. Case Law Interpretation of the Admissibility of Victim Impact Evidence

Victim impact evidence is only admissible "subsequent to an adjudication of guilt."[179] The admission of victim impact evidence is within the "sole discretion" of the court.[180] However, evidence that is inflammatory or unduly prejudicial, particularly racially or religiously, may never be admitted.[181] Evidence focusing on the "victim's social status"[182] or providing "a detailed narration of . . . emotional and economic sufferings of the victim's family" also is inadmissible.[183]

7. <u>Instructions to Jury About Awesome Power to Decide Between Life and Death</u>

The pattern jury instructions state "[w]hatever penalty is to be imposed within the limits of the law as I have instructed you is a matter solely for you, the jury, to determine."[184]

---

[176] Turner v. State, 486 S.E.2d 839, 842 n.5 (Ga. 1997); Simpkins v. State, 486 S.E.2d 833, 837 (Ga. 1997) (noting that "by providing a copy of the statement to the defense and the court before the sentencing phase, the trial court may ensure that the statement does not contain highly inflammatory statements")

[177] *Turner*, 486 S.E.2d at 842.

[178] *Id*.

[179] *See* O.C.G.A. § 17-10-1.2(a)(1) (2004); *see also Lucas v. State*, 555 S.E.2d 440, 445 (Ga. 2001).

[180] O.C.G.A. § 17-10-1.2(a)(1) (2004); Cronan v. State, 511 S.E.2d 899, 903 (Ga. Ct. App. 1999).

[181] O.C.G.A. § 17-10-1.2(a)(1) (2004); *Turner,* 486 S.E.2d at 842 (noting that some references to religion are not inflammatory).

[182] Livingston v. State, 444 S.E.2d 748, 752 (Ga. 1994) (citing Ingram v. State, 313 S.E.2d 801 (Ga. 1984)).

[183] *Turner*, 486 S.E.2d at 842.

[184] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.70, at 74 (3d ed. 2003).

8. Instructions After Jury Deliberations Have Begun

a. Pattern Jury Instructions

The United States Supreme Court, in *Allen v. United States*,[185] authorized judges to provide additional instructions to jurors after judges have rendered the main charge to the jury and jury deliberations have begun.[186] The Court upheld for that purpose the following instruction, which is known as the *Allen* charge:

> in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.[187]

The pattern jury instructions contain a "modified *Allen* charge" that may be used in all death penalty cases.[188] The instructions provide that if a jury has been deliberating on the issue of guilt/innocence for a considerable amount of time, the judge may provide the jury with the following jury instruction:

> You have now been deliberating upon this case for a considerable period of time, and the court deems it proper to advise you further in regard to the desirability of agreement, if possible. The case has been exhaustively and carefully tried by both sides and has been submitted to you for decision

---

[185] Allen v. United States, 164 U.S. 492, 501 (1896).

[186] *Id.*

[187] *Id.*; *see also* Romine v. State, 350 S.E.2d 446, 451-52 (Ga. 1986) (providing the text of the original *Allen* charge). The use of the *Allen* charge has been upheld by the Georgia Supreme Court in the following cases: *Anderson v. State,* 276 S.E.2d 603, 606 (Ga. 1981); *Ratcliff v. Ratcliff*, 134 S.E.2d 605, 608 (Ga. 1964); *Romine*, 350 S.E.2d at 451-52; *Wright v. State*, 553 S.E.2d 787, 789 (Ga. 2001); *Mayfield v. State*, 578 S.E.2d 438, 440-42 (Ga. 2003).

[188] McKee v. State, 591 S.E.2d 814, 817 (Ga. 2004) (noting that the jury instruction given in the case were a "modified *Allen* charge"); *Mayfield*, 578 S.E.2d at 440-42; *Romine*, 350 S.E.2d at 451-52 (noting "it is somewhat imprecise to refer to a single *Allen* charge. Decades of judicial interpretation have produced a variety of permutations . . . of the original wording . . . ."); Smith v. State, 370 S.E.2d 185, 188 (Ga. Ct. App. 1988) (noting that the *Allen* charge given in the case was taken verbatim from the pattern jury instructions).

> and verdict, if possible, and not for disagreement. It is the law that a unanimous verdict is required, and while this verdict must be the conclusion of each juror, and not a mere acquiescence of the jurors in order to reach an agreement, it is still necessary for all of the jurors to examine the issues and questions submitted to them with candor and fairness, and with a proper regard for, and deference to, the opinion of each other. A proper regard for the judgment of others will greatly aid us in forming our own judgment.
>
> This case must be decided by some jury selected in the same manner this jury was selected, and there is no reason to think a jury better qualified than you would ever be chosen. Each juror should listen to the arguments of other jurors with a disposition to be convinced by them. If the members of the jury differ in their view of the evidence, the difference of opinion should cause them all to scrutinize the evidence more closely and to reexamine the grounds of their opinion. Your duty is to decide the issues which have been submitted to you if you can conscientiously do so. In conferring, you should lay aside all mere pride of opinion and should bear in mind that the jury room is no place for taking up and maintaining, in a spirit of controversy, either side of a cause. You should ever bear in mind that as jurors, you should not be advocates for either side. The aim to keep in view is the truth as it appears from the evidence, examined in the light of the instructions of the court. You may again retire to your room for a reasonable time and examine your differences in a spirit of fairness and candor and try to arrive at a verdict.[189]

Similarly, if a jury has been deliberating on the defendant's sentence for a considerable amount of time, the judge may provide the jury with this instruction sans the portion of the instruction that states as follows: "This case must be decided by some jury selected in the same manner this jury was selected, and there is no reason to think a jury better qualified than you would ever be chosen."[190] This portion of the instruction was found by the Georgia Supreme Court to be contrary to the law applicable to death penalty cases, as it implied that if the jury could not reach a verdict as to the defendant's sentence, a new jury would be impaneled for that specific purpose.[191] Instead, section 17-10-31.1(c) of the O.C.G.A. provides that if the jury is unable to reach a unanimous verdict as to sentence but unanimously finds the existence of one statutory aggravating circumstance, the judge must dismiss the jury and impose a sentence of either life imprisonment or life imprisonment without parole—not impanel a new jury on the issue of the defendant's sentence.[192]

---

[189] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 602.80 (3d ed. 2003).
[190] *Id.*
[191] Legare v. State, 302 S.E.2d 351, 353-54 (Ga. 1983).
[192] O.C.G.A. § 17-10-31.1(c) (2004); *Legare*, 302 S.E.2d at 353-54 (noting that the statute at issue in *Legare* was section 17-10-31 of the O.C.G.A., which today is codified at section 17-10-31.1).

b. Case Law Interpretation of the Modified *Allen* Charge and the Permissible Instructions after the Jury Has Been Deliberating for an Extended Period of Time

The Georgia Supreme Court has upheld on numerous occasions judges' instructions that mirror the aforementioned pattern jury instructions ("modified *Allen* charge")[193] and permutations thereof.[194] Throughout the years, the Georgia Supreme Court has approved the practice of judges admonishing the jury on the importance of agreeing on a verdict and urging them to agree upon a verdict that is consistent with their consciences.[195] When urging the jury to agree upon a verdict, the judge may inform the jury that "mistrials are serious matters and in many ways defeat justice" and may cite "the time and expense involved in the trial and the time and expense involved in a new trial" as reasons for agreeing upon a verdict.[196]

The judge may not, however, suggest the propriety of any of the verdicts or unduly urge, coerce, or influence the jury into agreeing upon a verdict.[197] For example, the judge's instructions may not "coerce or influence individual jurors to surrender conscientious convictions and to accept the opinions of the majority solely in order to reach a verdict,"[198] nor may the instructions absolutely require the jury to reach a verdict by indicating that the jurors would "just have to stay in there until [they reach a verdict]."[199]

c. Case Law Interpretation of the Appropriate Response to Jury Questions Regarding Non-Unanimous Verdicts

The jury instructions provide the following as to unanimity of the verdict: "Whatever your verdict is, it must be unanimous, that is, agreed by all"[200] and "[y] our verdict as to penalty must be unanimous."[201] The Georgia Supreme Court has found that judges must instruct the jury that its verdict must be unanimous, but that they do not have to inform

---

[193] *See Mayfield,* 578 S.E.2d at 440-42; Spaulding v. State, 207 S.E.2d 43, 45-46 (Ga. 1974); Ratcliff v. Ratcliff, 134 S.E.2d 605, 606-08 (Ga. 1964) (finding that although the instructions urge the jurors to agree upon a verdict, it did not encourage the jurors to abandon their conscientious convictions).

[194] *See* Romine v. State, 350 S.E.2d 446, 452 (Ga. 1986); Anderson v. State, 276 S.E.2d 603, 606 (Ga. 1981); Yancy v. State, 160 S.E. 867, 870 (Ga. 1931).

[195] *Yancy*, 160 S.E. at 870; Hyde v. State, 26 S.E.2d 744, 755 (Ga. 1943); *see also* Allen v. United States, 164 U.S. 492, 501 (1896); *Spaulding*, 207 S.E.2d at 45.

[196] *Yancy*, 160 S.E. at 870.

[197] *Id.*; *Hyde*, 26 S.E.2d at 755; *Ratcliff*, 134 S.E.2d at 607-08.

[198] *Ratcliff*, 134 S.E.2d at 607-08.

[199] Sanders v. State, 290 S.E.2d 516, 517 (Ga. 1982).

[200] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 100.85 (3d ed. 2003).

[201] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.80, at 75 (3d ed. 2003).

the jury of the consequences of its inability to unanimously agree upon a verdict.[202] If the jury presents the judge with a question about the unanimity of the verdict, such as "what happens if we do not come up with a unanimous verdict," the judge may respond by indicating that s/he cannot answer that question, may answer the question by explaining the consequences of their inability to reach a verdict, or may encourage the jury to continue deliberating.[203]

9. Form of Instructions

a. Pattern Jury Instructions

The instructions indicate that before the jury deliberates, the judge may provide them with "a written copy of the[] statutory instructions regarding statutory aggravating circumstances."[204] Prior to distributing the copy, the judge must explain to the jury the purpose of the copy by stating as follows:

> [it is] to be used by you during your deliberations. I caution and instruct you, however, that such written instructions are not evidence and are not to be considered by you as evidence in this case. They are merely and solely for the purpose of aiding you in remembering these statutory instructions that the court has given you in charge and are sent out with you for that purpose alone and no other.[205]

b. Case Law Interpretation of the Appropriate Form of the Instructions

The Eleventh Circuit and various Georgia state courts have found that the distribution of a copy of the written court instructions during the guilt/innocence phase of a death penalty trial is "beneficial,"[206] but solely within the discretion of the court.[207] However,

---

[202] *See* Cargill v. State, 340 S.E.2d 891, 918 (Ga. 1986); Romine v. State, 350 S.E.2d 446, 452 (Ga. 1986); *see also* Heidler v. State, 537 S.E.2d 44, 56 (Ga. 2000) (finding that "the trial court was not required to instruct the jury on the consequences of a deadlock or to give the jury that option as a possible verdict").

[203] Cromartie v. State, 514 S.E.2d 205, 214-15 (Ga. 1999); Byrd v. State, 420 S.E.2d 748, 750 (Ga.1992).

[204] GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) § 2.04.30, at 70-71 (3d ed. 2003).

[205] *Id*.

[206] *See* Anderson v. State, 413 S.E.2d 732, 733-34 (Ga. 1992) (finding that although the distribution of written instructions to the jury may have been "an irregular [and prohibited] practice in the past," such practice should no longer be prohibited, as it is clearly beneficial. In its decision, the court relied on *Llewellyn v. State*, 243 S.E.2d 853 (Ga. 1973), which cited a case from the United States District Court stating that "it is frequently desirable that instructions which have been reduced to writing be not only read to the jury but also be handed over to the jury. . . . We see no good reason why the members of the jury should always be required to debate and rely upon their several recollections of what a judge said when proof of what he said is readily available." (emphasis omitted)); *see also* McPetrie v. State, 587 S.E.2d 233, 238-39 (Ga. Ct. App. 2003) (upholding the distribution of written instructions by finding, in part, that such practice has been described as "beneficial").

the O.C.G.A. requires that the "statutory instructions as determined by the trial judge" be given in writing to a capital jury for its deliberation during the sentencing phase.[208] The Georgia Supreme Court has found that the "statutory instruction as determined by the trial judge" may include as little as a written copy of the statutory aggravating circumstances orally charged by the judge.[209]

---

[207] U.S. v. Holman, 680 F.2d 1340, 1354 (11th Cir. 1982); U.S. v. Massey, 89 F.3d 1433, 1442 (11th Cir. 1996) (citing *Holman,* 680 F.2d at 1340); Ross v. State, 592 S.E.2d 479, 482 (Ga. 2003); *Anderson,* 413 S.E.2d at 733-34.

[208] O.C.G.A. § 17-10-30(c) (2004).

[209] Mulligan v. State, 264 S.E.2d 204, 208 (Ga. 1980); Speed v. State, 512 S.E.2d 896, 904 (Ga. 1999) (finding "[t]he trial court did not err by sending a written copy of the alleged statutory aggravating circumstances out with the jury during its deliberations, as required by OCGA § 17-10-30(c)"); Hall v. State, 415 S.E.2d 158, 163 (Ga. 1991) (relying on *Mulligan v. State,* 264 S.E.2d 204, 208 (Ga. 1980), to find that the written instructions provided to the jury were sufficient); *see also* GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) § 2.04.30, at 70-71 (3d ed. 2003) (stating that "you will be given a written copy of these statutory instructions regarding statutory aggravating circumstances").

II. ANALYSIS

A. *Recommendation #1*

> **Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.**

Although the Council of Superior Court Judges of Georgia has a "Standing Committee on Pattern Jury Instructions,"[210] to the best of our knowledge, the Committee does not work with linguists, social scientists, psychologists, or jurors to: (1) evaluate jurors' understanding of the "Georgia Suggested Pattern Jury Instructions—Criminal Cases" ("pattern jury instructions") or the actual instructions used in capital cases; (2) revise the pattern jury instructions as necessary to ensure juror comprehension of the applicable law; or (3) monitor jurors' understanding of the pattern jury instructions as revised to permit further revision as necessary. The State of Georgia, therefore, is not in compliance with Recommendation # 1.

B. *Recommendation #2*

> **Jurors should receive written copies of "court instructions" (referring to the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations.**

The Georgia Blue Ribbon Commission on the Judiciary[211] recommended in its 2001 report that the "[J]udicial [C]ouncil [of Georgia][212] propose uniform rules requiring that written instructions be provided to jurors for use in deliberations."[213] This

---

[210] *See* Superior Court of Georgia, About the Council of Superior Court Judges, *at* http://www.cscj.org/about/ (last visited on Aug. 18, 2005).

[211] The Blue Ribbon Commission on the Judiciary was established by the Georgia Supreme Court on March 1, 1999 for the purpose of considering the "structure and organization of the courts as they relate to efficiency and the effectiveness in the dispensation of justice." *See* Richard W. Creswell, *Georgia Courts in the 21st Century the Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1, 3 (2001).

[212] The Judicial Council of Georgia was created by the Georgia Supreme Court pursuant to section 15-5-20(a) of the O.C.G.A. *See* O.C.G.A. § 15-5-20(a) (2004). The Judicial Council of Georgia is "charged with developing policies for administering and improving the courts." *See* Judicial Branch of Georgia, Judicial Council of Georgia, *at* http://www.georgiacourts.org/councils/jc.html (last visited on Aug. 18, 2005).

[213] Creswell, *supra* note 211; *see also* Judge Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 177-178 (2000) (noting that 69.0% of the judges polled thought that juror comprehension would be aided by giving written instructions after the judge charged the jury and most believed that it would aid juror comprehension to have the instructions with them during deliberations).

recommendation, as well as Recommendation # 2, are supported by a number of studies finding that jurors provided with written court instructions ask fewer questions about the instructions during deliberations, make fewer comments about being confused about the instructions, waste less time trying to ascertain the meaning of the instructions, and spend less time inappropriately applying the law.[214] Written instructions, therefore, result in more efficient and worthwhile deliberations.[215]

Despite these findings and recommendations, neither the O.C.G.A. nor case law requires judges to distribute written copies of the judge's entire oral charge to jurors at any time during the guilt/innocence or sentencing phase of a capital trial. Rather, judges possess the sole discretion to distribute written copies of the entire oral charge.[216]

The O.C.G.A., however, does require judges to provide capital juries with written "statutory instructions as determined by [the judges]."[217] This requirement is satisfied as long as the judge provides the jury with a written copy of the statutory aggravating circumstances orally charged by the judge.[218] Apart from providing the obligatory written copy of the statutory aggravating circumstances orally charged, judges possess total discretion to determine which additional portions of the charge, if any, to provide in writing to capital juries. As a result, some capital juries may receive the entire oral charge in writing while others may receive only portions of the oral charge in writing.[219]

Because Georgia judges are not required to provide capital jurors with written copies of the entire oral charge while charging the jury and during juror deliberations, the State of Georgia fails to meet Recommendation #2.

---

[214] The Honorable B. Michael Dann, *'Lessons Learned' and 'Speaking Rights': Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1259 (1993); Young, *supra* note 213, at 162-63.

[215] Dann, *supra* note 214, at 1259; Young, *supra* note 213, at 162-63.

[216] U.S. v. Holman, 680 F.2d 1340, 1354 (11th Cir. 1982); U.S. v. Massey, 89 F.3d 1433, 1442 (11th Cir. 1996) (citing *Holman,* 680 F.2d at 1340); Anderson v. State, 413 S.E.2d 732, 733-34 (Ga. 1992); Ross v. State, 592 S.E.2d 479, 482 (Ga. Ct. App. 2003).

[217] O.C.G.A. § 17-10-30(c) (2004).

[218] Speed v. State, 512 S.E.2d 896, 904-08 (Ga. 1999) (finding that "[t]he trial court did not err by sending a written copy of the alleged statutory aggravating circumstances out with the jury during its deliberations, as required by OCGA § 17-10-30(c)"); Hall v. State, 415 S.E.2d 158, 163 (Ga. 1991) (relying on Mulligan v. State, 264 S.E.2d 204, 208 (Ga. 1980), to find that the written instructions provided to the jury were sufficient); Page v. State, 345 S.E.2d 600, 603 (Ga.1986) (trial judge provided the jury with a copy of the state's notice of intent to seek the death penalty, accompanied by oral instructions that the law requires the trial judge to include in his instructions to the jury for it to consider . . . any . . . statutory aggravating circumstances which may be supported by the evidence); *Mulligan*, 264 S.E.2d at 208; *see also* GA. SUGGESTED PATTERN JURY INSTRUCTION, VOL. II (CRIMINAL CASES) § 2.04.30, at 70-71 (3d ed. 2003).

[219] Cape v. State, 272 S.E.2d 487, 494-95 (Ga. 1980); Spraggins v. State, 252 S.E.2d 620, 622 (Ga. 1979); Collins v. State, 253 S.E.2d 729, 734-36 (Ga. 1979); *Mulligan*, 264 S.E.2d at 208 (noting, for example, that the jury could be provided with a list of the applicable aggravating circumstances with no mention of mitigating circumstances or the burden of proof as to mitigating circumstances); Collier v. State, 393 S.E.2d 509, 510 (Ga. Ct. App. 1990).

C. *Recommendation #3*

Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.

Capital jurors commonly have difficulty understanding jury instructions.[220] This can be attributed to a number of factors, including, but not limited to, the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions.[221] Given that jurors have difficulty understanding jury instructions, judges must respond meaningfully to jurors' requests for clarification of the instructions to ensure juror comprehension of the applicable law.

Studies have shown that Georgia capital jurors have difficulty understanding two main concepts: (1) mitigation evidence, and (2) the effect of finding certain aggravating circumstances.[222] Georgia capital jurors' difficulty in understanding the concept of mitigation evidence may be attributed to the lack of definitions and direction provided in the pattern jury instructions and required by the O.C.G.A. and Georgia Supreme Court. By contrast, jurors' confusion with the effect of finding certain aggravating circumstances may be attributed largely to their misinterpretation of the direction provided both in the pattern jury instructions and the O.C.G.A.

The pattern jury instructions contain only one instruction on how capital juries should consider mitigation evidence. The pattern instructions specifically advise the jury that when determining the defendant's punishment, it must consider "the facts and circumstances, if any, in extenuation[][and] mitigation . . . of punishment."[223] The pattern jury instructions also contain a definition for "mitigating circumstances;" however, the Georgia Supreme Court has found that judges do not have to provide this

---

[220] Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-551 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993) (focusing on South Carolina capital juries understanding or misunderstanding of jury instructions).

[221] James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1169-1170 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (discussing jurors understanding of the concept of mitigation evidence, including the scope, applicable burden of proof, and the required number of jurors necessary to find the existence of a mitigating factor).

[222] Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1077 (2001); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 68 (2003).

[223] GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.30, at 65 (3d ed. 2003).

definition or any definition for the term "mitigation," as it is a term of common usage and meaning.[224] Similarly, neither the pattern jury instructions nor the O.C.G.A. provide any guidance as to the scope of mitigation evidence, as neither source contains a list of factors that may be considered by the jury as mitigation,[225] and the Georgia Supreme Court has found that judges do not have to provide juries with lists of mitigating circumstances present in the cases.[226] Additionally, neither the pattern jury instructions nor the O.C.G.A. mention the burden of proof for mitigating circumstances or the requisite number of jurors necessary to find the existence of mitigating circumstances.[227]

Based on this information, it is no surprise that 40.5% of interviewed Georgia capital jurors did not understand that they could consider any evidence in mitigation[228] and that 62.2% believed that the defense had to prove mitigating factors beyond a reasonable doubt.[229] Similarly, 89% of interviewed Georgia capital jurors did not understand that they could consider any factor in mitigation regardless of whether other jurors agreed.[230] Georgia capital jurors are not only confused with the scope of mitigation evidence that they may consider but also with the applicable burden of proof and the unanimity required for a finding of mitigating factors.

Georgia capital jurors also have had difficulty understanding the effect of finding the existence of the statutory aggravating factor involving "heinous, vile or depraved" conduct and the non-statutory aggravating factor involving future dangerousness. Although judges are required to instruct the jury that it may impose "life imprisonment" even if it finds the existence of an aggravating circumstance, 51.4% of interviewed Georgia capital jurors believed that they were required to sentence the defendant to death if they found the defendant's conduct to be "heinous, vile, or depraved" beyond a reasonable doubt.[231] Similarly, 30.1% of interviewed Georgia capital jurors believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death.[232]

These figures illustrate the confusion among capital jurors regarding the jury instructions and highlight the importance of the manner in which judges respond to jurors' requests for clarification of the instructions. Despite the clear need for trial courts to make efforts to clarify juror confusion, we have been unable to determine whether courts are responding meaningfully to juror questions in practice. Consequently, we are unable to determine whether the State of Georgia meets Recommendation #3.

---

[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] Bowers and Foglia, *supra* note 222, at 68.
[229] *Id.*
[230] *Id.*; Bentele & Bowers, *supra* note 222, at 1077.
[231] Bowers & Foglia, *supra* note 222, at 72.
[232] *Id.*

D. Recommendation #4

> **Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.**

Recommendation #4 is composed of two parts. The first part requires judges to provide clear jury instructions on alternative punishments; the second requires judges to provide instructions and allow the introduction of evidence on parole practices, including witness testimony, upon the defendant's request.

1. Alternative Punishments

Section 17-10-31.1(d) of the O.C.G.A., adopted in 1993, provides for two alternative punishments to death, life imprisonment and life imprisonment without parole. In all death penalty cases where the offense was committed after May 1, 1993, or the defendant elected to be sentenced under section 17-10-31.1(d),[233] the O.C.G.A. and the Georgia Supreme Court clearly require judges to instruct juries on the two alternative punishments to death.[234] The judge's instructions must not only mention the availability of the alternative punishments, but also include the meaning of and difference between the two alternative punishments.[235] Section 17-10-31.1(d) and the pattern jury instructions provide definitions of the two alternative punishments.[236] Both sources clearly explain the possibility of parole under each alternative punishment. The O.C.G.A. also allows the state and defense to further clarify jurors' understanding of the alternative punishments by presenting arguments on the meaning and appropriateness of life without parole and life imprisonment.[237]

However, in death penalty cases where the offense occurred before May 1, 1993, or the defendant opts not to be sentenced under section 17-10-31.1(d), the O.C.G.A. prohibits judges from instructing juries on the meaning of "life imprisonment," which was the only alternative punishment to death prior to the adoption of section 17-10-31.1(d).

The prohibition against providing jurors with the meaning of "life imprisonment" directly affected a number of Georgia death penalty cases between 1973 and 1990.[238] Out of the 280 death penalty cases reviewed, capital jurors asked questions about the meaning of life

---

[233] *See supra* note 161 and accompanying text.
[234] *See supra* notes 154, 157-159 and accompanying text.
[235] *See supra* notes 157-159 and accompanying text.
[236] *See supra* note 154 and accompanying text.
[237] *See id*.
[238] J. Mark Lane, *'Is There Life Without Parole?': A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L. REV. 327, 335-37 (1993).

imprisonment and the possibility of parole in 70, or 25%, of the cases.[239] In all 70 cases, the capital jury returned a sentence of death after the judge refused to clarify the meaning of life imprisonment or the possibility of parole.[240] These figures underscore the importance of allowing judges to define the available alternative punishments and the need to provide juries with accurate information regarding states' parole practices.

2. Parole Practices

The State of Georgia requires judges to provide the jury with information on Georgia's parole practices only if two factors are present: (1) the state raises the issue of the defendant's future dangerousness; and (2) Georgia law prohibits the defendant's release on parole.[241] In all other capital cases, judges are not required to provide the jury with or to allow the defendant to admit any information as to Georgia's parole practices even upon the defendant's request.[242] Judges are not required to instruct the jury on mandatory minimum periods of imprisonment or on the likelihood of receiving parole if sentenced to "life imprisonment," [243] nor must the judge allow the introduction of evidence on these issues, including witness testimony.[244] Because judges are not required to inform capital juries about Georgia's parole practices upon the defendant's request, jurors have to rely solely on their own perceptions, or misperceptions, of Georgia's parole practices, including the availability and likelihood of receiving parole.

The problems associated with failing to inform capital jurors of parole practices have been illustrated in a number of studies.[245] These studies consistently have shown that capital jurors underestimate the total number of years defendants convicted of capital murder but not sentenced to death spend in prison.[246]

Between 1988 and 1990, 49.3% of interviewed Georgia capital jurors believed that capital murderers who were not sentenced to death were paroled in seven years, despite a fifteen-year mandatory minimum sentence for capital murder.[247] This study was

---

[239] *Id*.
[240] *Id*.
[241] *Id*.
[242] Philpot v. State, 486 S.E.2d 158, 161 (Ga. 1997) (citing Simmons v. South Carolina, 512 U.S. 154 (1994), and stating one "reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide 'greater protection in [the States'] criminal justice system than the Federal Constitution requires"); Henry v. State, 462 S.E.2d 737, 746 (Ga. 1995).
[243] Jackson v. State, 512 S.E.2d 241, 246 (Ga. 1999).
[244] *Henry*, 462 S.E.2d at 746; *Philpot*, 486 S.E.2d at 161; Lance v. State, 560 S.E.2d 663, 678 (Ga. 2002).
[245] *See* William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 645 (1999); Bowers & Foglia, *supra* 222, at 80; William J. Bowers, *The Capital Jury: Is it Titled Toward Death*, 79 JUDICATURE 220, 221-22 (1996).
[246] *See* Bowers & Steiner, supra note 245, at 645; Bowers & Foglia, *supra* note 222, at 80; Bowers, *supra* note 245, at 221-22.
[247] *See* Bowers & Steiner, *supra* note 245, at 650; Benjamin D. Steiner et al., *Folk Knowledge As Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*,

conducted prior to the adoption of section 17-10-31.1(d) of the O.C.G.A., when the only sentencing options for capital murder in Georgia were death and life imprisonment and judges were not required to provide a definition of "life imprisonment."[248] The study, however, also revealed that jurors' perceptions of the amount of time capital murders not sentenced to death usually served in prison did not vary widely among states that had "life without parole" and those that did not.[249] In fact, both capital jurors in states with and those without "life without parole" greatly underestimated the amount of time defendants convicted of capital murder but not sentenced to death spend in prison before they become eligible for parole.[250]

Even though Georgia now includes "life without parole" as a sentencing option, Georgia capital juries remain vulnerable to underestimating the total number of years a capital murderer not sentenced to death serves in prison and to making their sentencing decisions based on inaccurate beliefs as to the state's parole practices. In order to enable Georgia capital juries to make informed sentencing decisions, the State of Georgia should allow in the sentencing phase the introduction of evidence regarding its parole practices, including witness testimony, upon the defendant's request.

Based on the foregoing, the State of Georgia is only in partial compliance with Recommendation #4. The State of Georgia requires judges to provide the meaning of the alternative punishments to death only where the offense occurred after May 1, 1993 or where the defendant opted to be sentenced under section 17-10-31.1(d) of the O.C.G.A. and not in cases where the offense occurred before May 1, 1993 or where the defendant did not opt to be sentenced under section 17-10-31.1(d). Furthermore, the State of Georgia does not require judges to provide instructions or to admit evidence in the sentencing phase regarding the state's parole practices upon the request of the defendant.

E. Recommendation #5

> **Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.**

The Georgia Supreme Court requires all judges to "make clear" to the jury that it could recommend life imprisonment even if it found the existence of a statutory aggravating

---

33 LAW & SOC'Y REV. 461, 477-78 (1999) (discussing the impact media and "folk knowledge" has on jurors perceptions of Georgia's parole practices).

[248] Bowers & Steiner, *supra* note 245, at 650; Steiner et al., *supra* note 247, at 477-78 (discussing the impact media and "folk knowledge" has on jurors perceptions of Georgia's parole practices).

[249] *See* Bowers & Steiner, *supra* note 245, at 648 (1999).

[250] *Id.*

circumstance.[251] Judges' instructions, however, do not have to mention that the jury could recommend life imprisonment even in the absence of finding a mitigating circumstance nor do they have to inform the jury that they need not be unanimous on a finding of a mitigating circumstance. The pattern jury instructions do contain an instruction regarding recommending life imprisonment in the absence of mitigating circumstances, but the Georgia Supreme Court has yet to require judges to include this information in their instructions. The State of Georgia, therefore, only is in partial compliance with Recommendation #5.

It is important to note, however, that the instruction required by the Georgia Supreme Court is in part broader than Recommendation #5, as it is not limited to cases in which the "juror does not believe that the defendant should receive the death penalty." In fact, the Georgia Supreme Court and the pattern jury instructions both indicate that judges may instruct jurors that they are authorized to impose life imprisonment for any reason or without any reason.[252]

F. Recommendation #6

> **Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Further, jurisdictions should implement the provision of Model Penal Code Section 210.6(1)(f),[253] under which residual**

---

[251] Stynchcombe v. Floyd, 311 S.E.2d 828, 830 (Ga. 1984); Romine v. State, 305 S.E.2d 93, 100 (Ga. 1983); Spraggins v. State, 243 S.E.2d 20, 23 (Ga. 1978); Fleming v. State, 240 S.E.2d 37, 41 (Ga. 1977); Hawes v. State, 240 S.E.2d 833, 839 (Ga. 1977).

[252] McPherson v. State, 553 S.E.2d 569, 578 (Ga. 2001); GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.50, at 72 (3d ed. 2003).

[253] Section 210.6(1) of the Model Penal Code states as follows:

> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [rather than death] if it is satisfied that:
> (a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
> (b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
> (c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
> (d) the defendant was under 18 years of age at the time of the commission of the crime; or
> (e) the defendant's physical or mental condition calls for leniency; or
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

See MODEL PENAL CODE § 210.6(1); *see also* James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 311-313 (1994) (discussing the mitigating factors included in the Model Penal Code and the statutory factors under modern death penalty laws).

doubt concerning the defendant's guilt would, by law, require a sentence less than death.

The State of Georgia fails to meet the requirements of Recommendation #6, as it does not require judges to instruct jurors that residual doubt concerning the defendant's guilt is a mitigating circumstance nor does it have a state law requiring a sentence less than death in cases in which residual doubt concerning the defendant's guilt is present.[254] In fact, the O.C.G.A. and the pattern jury instructions do not even contain a list of mitigating circumstances that should be considered by juries, and the Georgia Supreme Court does not require judges to instruct juries on the relevant mitigating circumstances present in the case.[255] Instead, the judge need only instruct the jury to "consider mitigating circumstances in general, and that it could impose a sentence of life imprisonment for any reason or without any reason."[256]

G. Recommendation #7

In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.

Recommendation #7 is inapplicable to the State of Georgia, as it is a non-weighing state in that the jury does not have to assess whether the aggravating factors outweigh the mitigating factors in order to sentence the defendant to death; rather, the jury can sentence the defendant to death after finding the existence of at least one aggravating circumstance.[257]

---

[254] *McPherson*, 553 S.E.2d at 578 (discussing specifically residual doubt).
[255] *Id.*
[256] *Id.*
[257] *Id.*

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE

INTRODUCTION TO THE ISSUE

Our criminal justice system relies on the independence of the Judicial Branch to ensure that judges decide cases to the best of their abilities without political or other bias and notwithstanding official and public pressure. However, judicial independence is increasingly being undermined by judicial elections, appointments and confirmation proceedings that are affected by nominees' or candidates' purported views on the death penalty or by judges' decisions in capital cases.

During judicial election campaigns, voters often expect candidates to assure them that they will be "tough on crime," that they will impose the death penalty whenever possible, and that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular, even where these decisions are reasonable or binding applications of the law or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this occurs, the discourse is *not* about the Constitutional doctrine in the case but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law, but rather on the basis of how their decisions might affect their careers, and makes it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence and to prevent such harms in the future.

I. FACTUAL DISCUSSION

A. Selection of Judges

In the State of Georgia, all superior and state court judges are selected in non-partisan elections,[1] which are held and conducted jointly with the general election in each even-numbered year.[2] Once elected, superior court judges[3] serve four-year terms while justices of the Georgia Supreme Court and judges of the Georgia Court of Appeals serve six-year terms.[4]

If a judicial vacancy arises prior to the expiration of the term of office, the Governor of Georgia possesses the sole authority to appoint a new judge to the bench.[5] Since 1971, when Governor Jimmy Carter created by Executive Order the first judicial nominating commission to assist him with the appointment of judges,[6] all Georgia Governors have created similar commissions[7] for the same purpose.[8]

The current "Judicial Nominating Commission for the State of Georgia" (JNC) was created by Executive Order by Governor Sonny Perdue on June 11, 2003.[9] The JNC is composed of 19 Governor-appointed members[10] who are "to serve at the pleasure of the

---

1 GA. CONST. art. VI, § 7, para. 1.

2 O.C.G.A. § 21-2-138 (2005).

3 O.C.G.A. § 15-6-4 (2005) (requiring superior court judges to be 30 years old, to be citizens of Georgia for three years, and to have practiced law for seven years).

4 *See* GA. CONST. art. VI, § 7, para. 1 (establishing procedures for judicial elections); O.C.G.A. § 21-2-9 (2005) (governing date of judicial elections).

5 GA. CONST. art. V, § 2, para. 8(a) (stating that "[w]hen any public office shall become vacant by death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law"); GA. CONST. art VI, § 7, para. 3 (stating that "[v]acancies shall be filled by appointment of the Governor except as otherwise provided by law in the magistrate, probate, and juvenile courts"); O.C.G.A. § 15-7-23 (2005).

6 *See* Camille M. Tribble, *Awakening a Slumbering Giant: Georgia's Judicial Selection System After* White *and* Weaver, 56 MERCER L. REV. 1035, 1057-59 (2005) (discussing the Carter JNC model).

7 The composition of the judicial nominating commissions has varied from Governor to Governor. *Compare* Ga. Exec. Order, Regarding the Judicial Nominating Commission (June 11, 2003), Gov. Sonny Perdue, *at* http://www.gov.state.ga.us/2003_exec_orders.shtml (last visited on Jan. 9, 2006), *with* White v. Alabama, 74 F.3d 1058, 1071 n.40 (11th Cir. 1996) (stating that pursuant to the Executive Order issued by then-Governor Zell Miller, the judicial nominating commission is "a nine-member commission . . . [and] [t]he governor appoints five members of the commission, three lawyers and two non-lawyers. The lieutenant governor and the speaker of the house of representatives each appoint one non-lawyer member, and two members serve ex officio."), *and* Duncan v. Poythress, 515 F. Supp. 327, 332 n.2 (N.D. Ga. 1981) (stating that based on the Executive Order issued by then-Governor George Busbee,"[t]he Commission consists of five ex officio members of the State Bar of Georgia, and five members appointed by the Governor from the public at large").

8 *See* Tribble, *supra* note 6, at 1058-61 (comparing the different JNC models from Carter to Perdue).

9 Ga. Exec. Order, *supra* note 7.

10 The Commission currently is composed of the following nineteen members:

Governor."[11] The JNC is responsible for advertising any judicial vacancy, eliciting applications of qualified persons to fill the vacancy, and recommending to the Governor a list of no more than five individuals whom it finds are qualified for each judicial vacancy.[12] The Governor, however, is not bound by the recommendations, but rather may fill the vacancy with any qualified person.[13] The Governor's judicial appointments do not have to be confirmed by the Senate[14] and will serve for the unexpired term,[15] at the

---

> Michael J. Bowers, Chairman - Former Georgia Attorney General.
> Thurbert E. Baker - Attorney General of Georgia.
> Karen B. Baynes - Director of the Carl Vinson Institute's Governmental Services Division at the University of Georgia and a former associate juvenile court judge, Athens, Ga.
> James B. Franklin - Partner with Franklin, Taulbee, Rushing, Snipes & Marsh, P.C. since 1973 in Statesboro, GA, former State Bar President (2002) and former nominee to Federal District Court.
> James C. Gatewood - Attorney with Gatewood, Skipper & Rambo, P.C.
> J. Allen Hammontree - Partner with Goddard, Thames, Hammontree & Bolding, LLC, in Dalton, Ga, former 3-term State Representative, serving on the House Judiciary Committee and the Chief Justice's Indigent Defense Commission.
> William B. Hill, Jr. - Partner with Paul, Hastings, Janofsky & Walker LLP in Atlanta, Ga and former Superior Court Judge of the Atlanta Judicial Circuit.
> James P. Kelly, III - Private practice, James P. Kelly, III, P.C. in Atlanta, Ga.
> Michael J. Long - Partner with O'Neal Long & Hall in Warner Robins, GA. and County Attorney for Houston County, Ga.
> Leslie D. Mattingly - Former Master Commissioner, Indiana Superior Court.
> Claud L. "Tex" McIver, III - Partner with Fisher & Phillips LLP.
> Kenyon W. Murphy - Sr. Vice President & General Counsel of Acuity Brands, Inc.
> Dan E. Ponder, Jr. - Former Georgia State Representative and recent 2003 Profile in Courage Award winner in recognition of his passionate speech in support of hate-crime legislation before the Georgia Legislature.
> James W. Purcell – Partner with Fulcher Hagler Reed Hanks & Harper.
> Robert S. Reeves - Attorney in private practice, Swainsboro, Ga.
> Michael C. Russ - Partner at King & Spalding in Atlanta, Ga, a Trustee of the Metropolitan Atlanta Crime Commission, and a board member of Ministries to Women, a home for battered women and their children.
> Frank B. Strickland - Partner with Strickland Brockington Lewis, LLP in Atlanta, Ga. and Chairman of the Board of Directors of the Legal Services Corporation.
> H. Jerome Strickland - Attorney with Jones, Cork & Miller in Macon, Ga.
> Emory A. Wilkerson - Supervising lead attorney with State Farm Insurance Industries, Fayetteville, Ga.

Id.; Press Release, Office of the Governor of Georgia, Governor Perdue Announces Formation of the Judicial Nominating Commission, Former State Attorney General Michael Bowers to Serve as Chairman (June 11, 2003), *at* http://www.gov.state.ga.us/2003_releases.shtml (last visited on Jan. 9, 2006); *see also* Email from Barbara Watson, Executive Assistant to the Chair of the Judicial Nominating Commission, to Banafsheh Amirzadeh, Project Attorney, American Bar Association (Sept. 16, 2005) (on file with author).

[11] Ga. Exec. Order, *supra* note 7.

[12] *Id.*

[13] *See id.*; *see also* Tribble, *supra* note 6, at 1060 (noting an instance in which former Gov. Roy Barnes ignored his nominating commission when making an appointment).

[14] *See* 1960-61 Op. Att'y Gen. 101 (1960).

[15] GA. CONST. art. V, § 2, para. 8(a).

end of which time s/he will be subject to an election at the next general election. If, however, the appointment is made within six months of the next general election, "the appointee will remain in office beyond the time of the unexpired term and until the first of the year following the next general election and until a successor is duly selected and qualified."[16]

B. Conduct of Judicial Candidates and Judges

The "Judicial Qualifications Commission" (JQC),[17] created by Constitutional Amendment in 1972, possesses "the general power to discipline, remove, and cause involuntary retirement of judges."[18] The Georgia Supreme Court, charged with adopting "rules of implementation" for the discipline, removal, and involuntary retirement of judges,[19] adopted the Georgia Code of Judicial Conduct and established a set of rules governing the JQC.[20]

The JQC consists of seven members: two judges who are selected by the Georgia Supreme Court; three members of the State Bar of Georgia who have been active status members for at least ten years and are appointed by the state bar; and two citizens who are not members of the state bar and are appointed by the Governor.[21] The JQC may select from its members a Chairperson, Vice Chairperson, Director, and any other officers it deems necessary.[22] Members of the JQC serve four-year terms and until their successors are elected or appointed and qualified to serve.[23]

The JQC is charged specifically with investigating and making recommendations to the Georgia Supreme Court regarding the ethical misconduct of judicial candidates and judges.

1. Conduct Of and Complaints Against Judicial Candidates During Campaigns

Every year in which a general election is held or as deemed necessary by the JQC, the Chair of the JQC may select three members to serve on the "Special Committee on Judicial Election Campaign Intervention" (Special Committee).[24] The Director of the JQC also serves as an ex-officio member.[25] The Special Committee must monitor judicial candidates' compliance with Canon 7 of the Georgia Code of Judicial Conduct

---

[16] GA. CONST art. VI, § 7, para. 4; Perdue v. Palmour, 600 S.E.2d 370, 372 (Ga. 2004) (upholding the six month provision).
[17] GA. CONST. art. VI, § 7, para. 6.
[18] *Id.*; *see also* Weaver v. Bonner, 114 F. Supp. 2d 1337, 1339 (2000).
[19] GA. CONST. art. VI, § 7, para. 7(a).
[20] GA. JUD. QUAL. COMM'N (2005).
[21] GA. CONST. art. VI, § VII, para. VI; GA. RULES JUD. QUAL. COMM'N R. 1(a)(1)-(3) (2005).
[22] GA. JUD. QUAL. COMM'N R. 2(A), (E) (2005).
[23] GA. JUD. QUAL. COMM'N R. 1(b) (2005).
[24] GA. JUD. QUAL. COMM'N R. 27(a) (2005).
[25] *Id*.

and "deal expeditiously with allegations of ethical misconduct in campaigns for judicial office."[26]

Canon 7 requires all judicial candidates, including incumbent judges, to maintain a certain standard of conduct during their campaigns.[27] Canon 7(B) specifically requires judicial candidates to do the following:

1. Prohibit officials or employees subject to their direction or control or any other person from doing for them what they are prohibited from doing under Canon 7;[28]
2. Not make statements that commit the candidate with respect to issues likely to come before the court;[29]
3. Not use or participate in the publication of a false statement of fact concerning themselves or their candidacies, or concerning any opposing candidate or candidacy, with knowledge of the statement's falsity or with reckless disregard for the statement's truth or falsity;[30]
4. Be responsible for the content of any statement or advertisement published or communicated in any medium by a campaign committee if the candidate knew of or recklessly disregarded the content of said statement or advertisement prior to its release;[31]
5. Be responsible for reviewing and approving the content of his or her statements and advertisements, and those of his or her campaign committee, except where a statement or advertisement is published or communicated by a third party;[32] and
6. Not use or permit the use of campaign contributions for the private benefit of themselves or members of their families.[33]

---

[26] GA. JUD. QUAL. COMM'N R. 27(a), (b) (2005).

[27] GA. CODE OF JUD. CONDUCT Canon 7(B) (2005).

[28] GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(a) (2005).

[29] GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(b) (2005); *see also* GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(b) cmt. (2005) (noting that this Canon "does not prohibit a judge or candidate from publicly stating his or her political views on disputed issues").

[30] GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(c) (2005).

[31] GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(d)(2005). Prior to the Eleventh Circuit's 2002 decision in *Weaver v. Bonner*, finding Canon 7(B)(1)(d) an unconstitutional restraint on free speech, and the 2004 revisions to the Code of Judicial Conduct, Canon 7(B)(1)(d) prohibited judges and judicial candidates from "us[ing] or participat[ing] in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve." Weaver v. Bonner, 309 F.3d 1312, 1315 (11th Cir. 2002).

[32] GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(e) (2005).

[33] GA. CODE OF JUD. CONDUCT Canon 7(B)(2) (2005). Canon 7(B)(2) was revised in 2004 after the Eleventh Circuit found portions of it to be unconstitutional. *See Weaver,* 309 F.3d at 1312. Prior to the revision, Canon 7(B)(2) prohibited judicial candidates from personally soliciting campaign contributions and from personally soliciting publicly stated support. *Id.*

If the JQC receives a complaint or information "facially indicating a violation" by a judicial candidate of any provision of Canon 7, the Special Committee must act on the complaint within ten days of receipt.[34] The Director must forward a copy of the complaint or information to all members of the Special Committee.[35] The Special Committee must then procure from the complainant and/or the subject of the complaint any additional information on the allegations of the complaint as necessary and conduct any additional investigation as deemed necessary by the Special Committee.[36] The Special Committee must also determine whether the allegations require "speedy intervention."[37]

If the allegations do not require "speedy intervention," the Special Committee may dismiss the complaint.[38] Alternatively, if the allegations require further investigation, the Special Committee may request confidential written responses from the subject of the complaint and the complaining party on the following schedule:[39]

1. Within 3 business days of receiving such a request from the Committee, a written response from the subject of the complaint;
2. The Committee will share the subject's written response with the complaining party on a confidential basis, who shall be requested to provide a written response within 3 business days; and
3. The Committee will share the complaining party's response with the subject of the complaint, who then shall be requested to submit a written rebuttal within 1 business day.[40]

If, after reviewing the documents submitted by the parties, the Special Committee determines that the allegations do not warrant intervention, the Committee must dismiss the complaint and notify the complaining party and the subject of the complaint.[41] If, however, the Committee determines that the allegations require intervention, the Committee may "immediately release to the complaining party and the person and/or organization complained against, a non-confidential "Public Statement" setting out violations believed to exist; and/or [ ] refer the matter to the full Commission for such action as may be appropriate under the applicable rules."[42]

---

[34] GA. JUD. QUAL. COMM'N R. 27(c), (d) (2005).
[35] GA. JUD. QUAL. COMM'N R. 27(c) (2005).
[36] GA. JUD. QUAL. COMM'N R. 27(c)(1), (2) (2005).
[37] GA. JUD. QUAL. COMM'N R. 27(c)(3) (2005).
[38] *Id*.
[39] This schedule can be accelerated if a complaint is filed within two weeks before a judicial election, or if circumstances otherwise dictate. *See* GA. JUD. QUAL. COMM'N R. 27(b)(4) (2005).
[40] *Id.*
[41] GA. JUD. QUAL. COMM'N R. 27(b)(6) (2005).
[42] GA. JUD. QUAL. COMM'N R. 27(b)(5) (2005).

2. Conduct Of and Complaints Against Judges

a. Conduct of Judges

The Official Code of Georgia Annotated (O.C.G.A.) and the Georgia Code of Judicial Conduct include a number of important standards of conduct to which active judges are required to adhere. This discussion, however, will focus on the standards of conduct pertaining to three issues: (1) judicial impartiality; (2) public comment on cases; and (3) the conduct of prosecutors and defense attorneys.

i. Judicial Impartiality

Judges are required to participate in "establishing, maintaining, and enforcing high standards of conduct and shall personally observe such standards of conduct so that the integrity and independence of the judiciary may be preserved."[43] Judges are specifically required to be "faithful to the law" and "not be swayed by partisan interests, public clamor, or fear of criticism."[44] Judges also are required to perform their judicial duties "without bias or prejudice."[45] Any judge who "manifest[s] bias on any basis in a proceeding impair[s] the fairness of the proceeding and bring[s] the judiciary into disrepute."[46]

ii. Public Comment on Cases

Judges must refrain from making any public comment that "might reasonably be expected to affect [a court proceeding's] outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing" at any time "while a proceeding is pending or impending in any court," [47] including during any appellate process and until final disposition.[48]

iii. Conduct of Prosecutors and Defense Attorneys

The Canons provide that judges must require "[attorneys] in proceedings before the judge to refrain from manifesting, by words and conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others."[49] Likewise, the O.C.G.A. provides that "[w]here counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same."[50] If the

---

43 GA. CODE OF JUD. CONDUCT Canon 1 (2005).
44 GA. CODE OF JUD. CONDUCT Canon 3(B)(2) (2005).
45 GA. CODE OF JUD. CONDUCT Canon 3(B)(5) (2005).
46 GA. CODE OF JUD. CONDUCT Canon 3(B)(5) cmt. (2005).
47 GA. CODE OF JUD. CONDUCT Canon 3(B)(9) (2005).
48 GA. CODE OF JUD. CONDUCT Canon 3(B)(9) cmt. (2005).
49 GA. CODE OF JUD. CONDUCT Canon 3(B)(6) (2005).
50 O.C.G.A. § 17-8-75 (2005).

other party objects to the prejudicial statement, the judge must also "rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his[/her] discretion, [s/]he may order a mistrial if the prosecuting attorney is the offender."[51]

"Judges who receive information indicating a substantial likelihood that [an attorney] has committed a violation of the Standards of Conduct of the State Bar of Georgia (Standards of Conduct) should take appropriate action."[52] Appropriate action includes: "direct communication with the . . . [attorney] who has committed the violation, or other direct action if available, and reporting the violation to the appropriate authority or other agency or body." [53] If an attorney's violation of the Standards of Conduct raises a "substantial question" of the attorney's fitness as a practitioner and is "actually known" to the judge, the judge must report the violation to the State Bar of Georgia.[54]

b. Complaints Against Judges

An individual wishing to file a complaint against a judge may do so in writing to the JQC.[55] Upon receiving a complaint or other information regarding a judge's conduct, including "willful misconduct in office, [ ] willful and persistent failure to perform the duties of a judge, [ ] habitual intemperance, [ ] conduct prejudicial to the administration of justice which brings the judicial office into disrepute, or . . . a disability that seriously interferes with the performance of the judge's duties which is or is likely to become permanent, the [JQC] may make an initial inquiry of the judge" for his/her comments as to the complaint or information.[56] The JQC may also conduct an investigation into the judge's conduct to determine whether a formal proceeding should be instituted and a hearing held.[57] During the investigation, the JQC may issue subpoenas for witnesses to appear before the JQC to make a sworn statement and/or may issue subpoenas for the production of books, papers, and any other relevant evidence.[58]

Before deciding whether to institute formal proceedings, the JQC must send the judge a copy of the complaint or a synopsis of the matters under investigation and provide him/her with a "reasonable opportunity" to respond if s/he so desires.[59] The JQC may fix a time by which the judge's response must be filed.[60] The judge may make his/her

---

[51] *Id.*; *see also* Louis v. State, 364 S.E.2d 607, 608 (Ga. Ct. App. 1988) (exemplifying that the language "prosecuting attorney" found in section 17-8-75 is not limited to prosecuting attorneys but also includes defense counsel and co-defendant's counsel thereby granting the judge discretion to declare a mistrial when defense counsel or co-defendant's counsel is the offender).
[52] GA. CODE OF JUD. CONDUCT Canon 3(D)(2) (2005).
[53] GA. CODE OF JUD. CONDUCT Canon 3(D)(2) cmt. (2005).
[54] GA. CODE OF JUD. CONDUCT Canon 3(D)(2) cmt. (2005).
[55] GA. JUD. QUAL. COMM'N R. 4(a) (2005).
[56] GA. JUD. QUAL. COMM'N R. 4(b) (2005).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

response personally or through his/her counsel and it may be verbal or in writing and it does not have to be under oath.[61] If the judge fails to respond within a reasonable time or the time fixed by the JQC, his/her opportunity to do so is waived.[62]

As part of the inquiry/investigation and before a decision has been made regarding the institution of formal proceedings, the JQC may have one or more of its members "personally and confidentially" confer with the judge and make informal recommendations regarding the subject matter of the investigation and the disposition thereof.[63] If the judge agrees to the disposition recommended by the JQC, then the matter will be disposed of pursuant to the agreement.[64] The JQC, thereafter, must file a report of the disposition with the Georgia Supreme Court.[65]

If the JQC finds that the complaint or the information does not show any reason to institute formal disciplinary proceedings, the JQC must advise the complainant and judge of the findings.[66] The judge need not be advised when the complaint against him/her "fail[s] to state any grounds for disciplinary proceedings." If the judge's behavior does not warrant formal disciplinary proceedings but does warrant sanctions, the JQC may informally do any the following:

(1) Admonish and/or reprimand a judge;
(2) Direct professional counseling and assistance for a judge;
(3) Impose conditions on a judge's future conduct or instruct a judge to make specific changes in particular matters of conduct; or
(4) Adjust the complaint by any other appropriate means consistent with these rules.[67]

Alternatively, if the JQC finds that formal proceedings should be instituted and a hearing held, it must issue, "as promptly as possible, a written notice to the judge advising [him/her] of the institution of formal proceedings to inquire into the charges against the judge."[68] The written notice must specify the charges with "sufficient fullness" to enable the judge to understand the charges against him/her and must advise the judge of his/her right to file a written answer to the charges.[69] The original answer plus six copies must be filed thirty days after service of the notice.[70] The JQC must file a copy of the notice with the Georgia Supreme Court.[71]

---

61 *Id.*
62 *Id.*
63 GA. JUD. QUAL. COMM'N R. 4(d) (2005).
64 *Id.*
65 *Id.*
66 GA. JUD. QUAL. COMM'N R. 4(c) (2005).
67 GA. JUD. QUAL. COMM'N R. 4(f) (2005).
68 GA. JUD. QUAL. COMM'N R. 5(a) (2005).
69 GA. JUD. QUAL. COMM'N R. 5(b) (2005).
70 GA. JUD. QUAL. COMM'N R. 5(c) (2005).
71 GA. JUD. QUAL. COMM'N R. 5(b) (2005).

After the answer has been filed or after the time allowed for filing has expired, the JQC must order a hearing or request the Georgia Supreme Court to appoint a Special Master to hear and take evidence in the matter and to report back to the JQC.[72] During the hearing, the judge may be represented by counsel and s/he as well as the JQC may admit evidence and call witnesses to testify.[73] Following the hearing or, if a Special Master was appointed, after s/he releases his/her findings, the judge may file an original brief and six copies to support the judge's claim or refute the Special Master's findings.[74]

In cases in which a Special Master was appointed, the JQC "may accept, modify or reject any or all" of the Special Master's findings as well as his/her recommendation as to whether the judge should be disciplined.[75] Based on the hearing or the Special Master's findings and/or recommendation, the JQC must generate a report recommending to the Georgia Supreme Court that the judge be:

(1) Removed from office;
(2) Removed from office and prohibited from thereafter holding judicial office;
(3) Suspended from office for a specified period of time together with such other conditions and restrictions as the [JQC] may consider proper;
(4) Censured;[76]
(5) Reprimanded;
(6) Retired; or
(7) Subjected to such other discipline as deemed appropriate by the JQC.[77]

The report must be signed by the members of the JQC and it must indicate which members concurred and which dissented, if any, from the report.[78] The report must be filed with the Georgia Supreme Court and a copy must be served upon the judge.[79]

C. Training of Judges Who Handle Capital Cases

All new superior court judges, including those presiding over capital cases at the trial level, are required to attend the Institute of Continuing Judicial Education (ICJE) "as soon as possible" after their election or appointment or, at the latest, within one year after assuming office.[80] New superior court judges are also "encouraged" to attend a nationally-based basic course for general jurisdiction trial judges.[81]

---

[72] GA. JUD. QUAL. COMM'N R. 6 (2005).
[73] GA. JUD. QUAL. COMM'N R. 8(e), (f) (2005).
[74] GA. JUD. QUAL. COMM'N R. 11(a), (d) (2005).
[75] GA. JUD. QUAL. COMM'N R. 11(c) (2005).
[76] If a censure is approved by the Georgia Supreme Court, it must be administered in open court. *See* GA. JUD. QUAL. COMM'N R. 14(a) (2005).
[77] *Id*.
[78] GA. JUD. QUAL. COMM'N R. 14(b) (2005).
[79] *Id.*
[80] GA. UNIF. SUPER. CT. R. 43.1(B).
[81] *Id*.

Additionally, each year, every superior court judge must attend a minimum of twelve hours of "approved creditable judicial education programs or activities."[82] At least one of the twelve hours must be dedicated to legal or judicial ethics or legal or judicial professionalism.[83] Judges also are "encouraged to attend national or regional specialty, graduate or advanced programs of judicial and legal education."[84]

The Committee on Mandatory Continuing Judicial Education (MCJE), appointed by the President of the Council of Superior Court Judges, may impose private and public sanctions on judges who fail to comply with the mandatory continuing education program.[85] If a judge fails to attain the required twelve hours of continuing education, the MCJE must inform the judge of this noncompliance and the judge must submit to the MCJE a plan for making up any deficiency in his/her continuing education requirements.[86] Similarly, if a judge fails to attain a minimum of twenty-four hours over a two-year period of time, the MCJE must issue a private administrative admonition detailing the consequences of his/her failure to fulfill the education requirements.[87]
If the judge's failure to fulfill the education requirements continues for a third year, the President of the Council of Superior Court Judges must issue a public reprimand.[88]

---

[82] GA. UNIF. SUPER. CT. R. 43.1(A). It should be noted that "creditable judicial education programs and activities" include:

(1) Programs sponsored by the Institute of Continuing Judicial Education of Georgia;
(2) Programs of continuing legal education accredited by the State Bar of Georgia's Commission on Continuing Lawyer Competency, such as all Institute of Continuing Legal Education (ICLE) programs;
(3) Additional programs approved on behalf of the Council of Superior Court Judges by its Committee on Mandatory Continuing Judicial Education;
(4) Courses at a Georgia-based law school, whether for credit or not, that qualify an individual for a degree or to sit for the Georgia bar examination.;
(5) Teaching any of the above; and
(6) Service on the Judicial Qualifications Commission or the State Bar Disciplinary Board for legal or judicial ethics or legal or judicial professionalism credit.

GA. UNIF. SUPER. CT. R. 43.1(D).

[83] GA. UNIF. SUPER. CT. R. 43.1(A).

[84] GA. UNIF. SUPER. CT. R. 43.1(C).

[85] GA. UNIF. SUPER. CT. R. 43.3.

[86] GA. UNIF. SUPER. CT. R. 43.4(1).

[87] GA. UNIF. SUPER. CT. R. 43.4(2).

[88] GA. UNIF. SUPER. CT. R. 43.4(3).

II. ANALYSIS

A. Recommendation #1

States should examine the fairness of their processes for the appointment/election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

To the best of our knowledge, the State of Georgia is not currently examining the fairness of the judicial appointment/election process[89] nor is it undertaking a public education effort to inform the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

The fairness of the election/appointment process in Georgia, however, has been called into question for a number of reasons. The Georgia Constitution requires judges to be elected in nonpartisan elections,[90] which increases the influence of money in the judicial selection process, especially given the rising costs associated with running and/or winning judicial campaigns in the State of Georgia.[91] In 2004, two candidates for one contested Georgia Supreme Court seat raised a combined total of more than $815,000;[92] just two years earlier in 2002, candidates for two contested Georgia Supreme Court seats raised a combined total of approximately $700,000.[93]

The rising costs of campaigns also require candidates and/or their agents to solicit more and more campaign contributions. Until recently, judicial candidates were prohibited from personally soliciting campaign contributions[94] but, as of January 2004, the Georgia

---

[89] We note that in the recent past, the Georgia Supreme Court created two commissions to study the judiciary, but neither commission was created for the purpose of assessing the fairness of the appointment/election process. *See, e.g.*, Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687 (1996); Richard W. Creswell, *Georgia Courts in the 21st Century the Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary*, 53 MERCER L. REV. 1, 3 (2001) (stating that the Blue Ribbon Commission on the Judiciary was created to consider the "structure and organization of the courts as they relate to efficiency and effectiveness in the dispensation of justice") (quoting Ga. Sup. Ct. Order establishing the Commission on the Judiciary (Mar. 1, 1999)).

[90] GA. CONST. art. VI, § 7, para. 1.

[91] *Compare* JUSTICE AT STAKE CAMPAIGN, *The* NEW POLITICS OF JUDICIAL ELECTIONS 2004 13 (2005), *with* JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002 19 (2005), and JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000 11 (2005).

[92] JUSTICE AT STAKE CAMPAIGN, *The* NEW POLITICS OF JUDICIAL ELECTIONS 2004 13 (2005).

[93] Martha Ezzard, *Money Can't Buy Judicial Elections*, ATLANTA J. CONST, Aug. 18, 2002, at G3.

[94] Weaver v. Bonner, 309 F.3d 1312, 1321 (11th Cir. 2002) (striking down the provision of the Georgia Code of Judicial Conduct that prohibited judges from personally soliciting campaign contributions; in doing so, the court stated "the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that distinction, if there truly is one, justifies greater restriction on speech during judicial campaigns than during other types of campaigns").

Code of Judicial Conduct allows "[c]andidates, including an incumbent judge, for a judicial office [to] personally solicit campaign contributions."[95] The Commentary to the Georgia Code of Judicial Conduct encourages candidates to establish a committee to "secure and manage the expenditure of funds for their campaigns,"[96] but it does not restrict them from soliciting funds from individuals or organizations that could have an interest in the cases the candidate will decide as a judge.[97]

In addition to requiring judges be elected in nonpartisan elections, the Georgia Constitution grants the Governor the sole authority to fill any judicial vacancy that arises at any time prior to the expiration of the term of office.[98] The Governor may, but is not required to, fill the vacancy from a list of nominees created by the JNC. The impact of the Governor's power to fill judicial vacancies by appointment was discussed by the United States District Court for the Southern District of Georgia in *Brooks v. State Board of Education*,[99] in which the court stated that "[t]he vast majority of judges in this state have reached the bench via appointment."[100]

This process of filling judicial vacancies by appointment results in the Governor and the JNC choosing who will serve as a judge. It also grants the appointed judge the advantage of running for reelection as an incumbent. On this issue, the United States District Court for the Southern District of Georgia stated as follows: "[a]ll judges and justices are subject to challenge in open elections . . . In reality, however, few incumbents are actually challenged in contested elections, and, of the few incumbents who are challenged, even fewer are defeated at the polls."[101]

Regardless of whether a candidate is running for election or reelection, however, judicial campaigns in the State of Georgia have become increasingly politicized.[102] In fact, in

---

[95] GA. CODE OF JUD. CONDUCT Canon 7(B)(2) (2005).

[96] GA. CODE OF JUD. CONDUCT Canon 7(B)(2) cmt. (2005).

[97] ABA COMM'N ON THE 21TH CENTURY JUDICIARY, JUSTICE IN JEOPARDY 70 (2003).

[98] *See* GA. CONST. art. V, § 2, para. 8 (stating vacancies will be filled by the Governor "unless otherwise provided by this Constitution or by law"); GA. CONST. art. VI, § 7, para. 3 (noting vacancies will be appointed by the Governor "except as otherwise proved by law in the magistrate, probate, and juvenile courts").

[99] Brooks v. State Bd. of Elections, 848 F. Supp. 1548 (S.D. Ga. 1994).

[100] *Brooks*, 848 F. Supp. at 1557; *see also* Steve Visser, *Bowers: Governor Can Skirt Vote On Judges Ex-Solicitor Asks Place On Ballot*, ATLANTA J. CONST., July 16, 2002, at D7 (stating that former Attorney General Michael Bowers argued in a federal court that the "current interpretations of Georgia's Constitution are so flawed that governors can circumvent the election of judges").

[101] *Brooks*, 848 F. Supp. at 1557; *see also* Don Plummer & Bill Rankin, *Judges' Ace: Incumbency on the Bench: Most Jurists Are Re-elected, Fending Off Aggressive Campaign Attacks*, ATLANTA J. CONST., July 25, 2004, at C5 (noting "[e]ven though it appeared to be open season on sitting judges . . . only one high-ranking incumbent judge lost statewide").

[102] *See, e.g.*, Brian Basinger, *Perdue Looks at Partisan Judicial Races*, AUGUSTA CHRON., May 24, 2005, at B02 (stating that Gov. Perdue said that "he could see himself supporting a constitutional amendment to turn future Georgia judicial elections into partisan contests because of the increasingly political nature of such races"); Jim Wooten, *Our Opinion*: *Voters in Dark on Judge Races*, ATLANTA J. CONST., Nov. 28, 2004, at G6 (discussing the direct expenditures by political parties on judicial campaigns).

light of the "increasingly political nature of [judicial] elections," Governor Sonny Perdue said that "he could see himself supporting a constitutional amendment to turn future Georgia judicial elections into partisan contests," although he "said that he did not support the change 'at this time,' [but] 'if we're not able to take partisanship out of races . . . I think we should open it up.'"[103] An example of a recent politicized campaign is the 1998 campaign between Honorable Leah Sears and George M. Weaver,[104] which resulted in litigation and amendments to the Georgia Code of Judicial Conduct.

During the 1998 election, Mr. Weaver distributed a campaign brochure stating, in part, "Justice Sears has called the electric chair 'silly'" and later ran a television ad with a similar message.[105] In response to the campaign brochure, the JQC found that portions of the brochure violated former Canon 7(B)(1)(d), prohibiting false, misleading, and deceptive communications, and issued a private "cease and desist" order; and in response to the television ad, the JQC issued a public reprimand and forwarded Mr. Weaver's materials to the State Bar of Georgia for disciplinary action.[106] Mr. Weaver brought a federal lawsuit against several of the members of the JQC alleging that former Canon 7(B)(1)(d) and the "cease and desist" order unconstitutionally interfered with free speech.[107] The Eleventh Circuit, in *Weaver v. Bonner*, agreed with Mr. Weaver, finding that former Canon 7(B)(1)(d) "prohibits far more speech than necessary" and that the issuance of the "cease and desist" order is "an impermissible prior restraint on protected speech."[108] As a result, the Supreme Court of Georgia revised the Georgia Code of Judicial Conduct in 2004, deleting former Canon 7(B)(1)(d) and removing any prohibition against false statements negligently made and true statements that are misleading or deceptive.[109]

Since *Weaver*, judicial candidates have campaigned on the issue of the death penalty and other issues relating to the death penalty. In the Cobb County judicial race of 2004, a judicial candidate challenging an incumbent superior court judge distributed campaign literature featuring a picture of the current district attorney with the message, "I support the death penalty, but some judges don't. Consider Dorothy Robinson [the incumbent judge]."[110] In another 2004 judicial election, a judicial candidate running for an open seat on the Georgia Court of Appeals ran television commercials characterizing his opponents as "high-priced criminal defense lawyers [who] work for the kind of people they once sent to jail."[111]

---

[103] Basinger, *supra* note 102.
[104] Tribble, *supra* note 6, at 1065-66.
[105] Weaver v. Bonner, 309 F.3d 1312, 1316-17 (11th Cir. 2002).
[106] *Id.*
[107] *Id.* at 1317.
[108] *Id.* at 1321-23.
[109] GA. CODE OF JUD. CONDUCT, *as amended by* Order of the Sup. Ct. of Ga. (Jan. 7, 2004).
[110] Plummer & Rankin, *supra* note 101, at C5.
[111] Jonathan Ringel, *Mudslinging Judicial Campaign Draws Ethics Complaint*, FULTON COUNTY DAILY REP., Nov. 1, 2004, *at* http://www.law.com/jsp/article.jsp?id=1098907065069 (last visited on Jan. 9, 2004); *see also* Tribble, *supra* note 6, at 1074.

Even though some judicial campaigns seem to focus on judicial candidates' views on criminal justice issues, it does not appear that the judicial appointment process is influenced by judicial nominees' purported views on the death penalty or on *habeas corpus*. To the best of our knowledge, no potential JNC nominee has claimed that his/her view on the death penalty or on *habeas corpus* precluded his/her appointment. On this issue, Michael Bowers, the current chairman of the JNC, stated that during the terms of Governors Sonny Perdue and Zell Miller, potential nominees were asked whether they would have trouble administering the death penalty under the laws of Georgia, but nominees' personal opposition to the death penalty did not preclude their appointment as long as they would be able to follow the law.[112] Former Governor Roy Barnes, who served a single term in office from 1999 to 2003, said neither he nor members of his JNC inquired into a potential nominee's views on the death penalty.[113]

Because the State of Georgia is not currently examining the fairness of the judicial appointment/election process or undertaking a public education effort to inform the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary, it fails to meet the requirements of Recommendation # 1.

B. Recommendation #2

> **A judge who has made any promise—public or private—regarding his or her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.**

The Code of Judicial Conduct prohibits judicial candidates and judges from making statements that may impact current and/or future decisions. Canon 7 states that judicial candidates may not "make statements that commit the candidate with respect to issues likely to come before the court."[114] Similarly, Canon 3 states that judges must refrain from making any public comment that "might reasonably be expected to affect [a court proceeding's] outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing" at any time while a proceeding is pending or impending in any court, including during any appellate process and until final disposition.[115]

---

[112] *See* Telephone Interview with Michael Bowers, Chairman, Judicial Nominating Commission (Sept. 29, 2005) (on file with author); *see also* Email from Harold Melton, Exec. Counsel to Gov. Sonny Perdue, to Colby Jones, Student, Georgia State University College of Law (Oct. 27, 2004) (on file with author) (noting that a potential nominee's views on the "legality of any subject have not been discussed or played a role in any appointments").

[113] *See* E-mail Interview with Roy Barnes, Former Governor of Georgia (Oct. 18, 2004) (on file with author).

[114] GA. CODE OF JUD. CONDUCT Canon 7(B)(1)(b) (2005).

[115] GA. CODE OF JUD. CONDUCT Canon 3(B)(9) cmt. (2005).

Despite Canons 3 and 7, judicial candidates continue to campaign on their views of the death penalty (as illustrated under Recommendation #1) without any apparent ramifications. Since the JQC was created in 1973, only one judicial candidate, George M. Weaver, has been publicly reprimanded by the JQC and reported to the State Bar of Georgia for comments made during a judicial campaign that relate to the death penalty,[116] and no ethics proceedings have been initiated against a judge in connection with him/her presiding over a death penalty case.[117] Complaints to the JQC, however, are confidential,[118] so complaints could have been filed and acted upon privately but not discussed publicly.[119]

Based on this information, it is unclear whether the State of Georgia is taking sufficient steps to preclude judges, who make promises regarding their prospective decisions in capital cases that amount to prejudgment, from presiding over capital cases or from reviewing any death penalty decision in the jurisdiction.

C. Recommendation #3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak out themselves.

a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not "technicalities" and that judges and lawyers are bound to protect those rights for all defendants.

b. Bar associations and community leaders publicly should oppose any questioning of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they have upheld the death penalty.

---

[116] Weaver v. Bonner, 309 F.3d 1312, 1316-17 (11th Cir. 2002) (noting that Weaver first received a private "cease and desist" order concerning the contents of his campaign brochure, which stated, in part, "Justice Sears has called the electric chair 'silly,'" before he received a public reprimand in response to his television ad with a similar message; the Eleventh Circuit found the "cease and desist" order to be unconstitutional); *see also* Tribble, *supra* note 6, at 1048-53.

[117] Telephone Interview with Cheryl Custer, Executive President, Georgia Judicial Qualifications Commission (October 18, 2004). Three judges, however, have been removed from office in the last ten years for other reasons. *See* Patrick Emery Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913, 942 (2005).

[118] Custer, *supra* note 117.

[119] *See* Lucy Soto, *Spotlight/Every Monday: Most Verdicts in Judges' Cases Are Reached in Camera Since 1994, Only 3 Percent of Actions by the Judicial Qualifications Commission Has Been in Public*, ATLANTA J. CONST., Oct. 2, 2000, at B1 (noting that the Georgia Judicial Qualifications Commission reprimands jurists mainly in private).

c. Purported views on the death penalty or on *habeas corpus* should not be litmus tests or important factors in the selection of judges.

We did not obtain sufficient information to appropriately assess the role of bar associations and community leaders in fulfilling the requirements of Recommendation #3.

We note, however, that in April 2004, former ABA President Bill Ide formed the "Georgia Committee for Ethical Judicial Campaigns" (the Committee) to monitor "campaigns for the bench."[120] The Committee asks every judicial candidate for a statewide race to pledge to abide by the rules struck down in *Weaver v. Bonner*[121] and to agree not to say anything that would "lead voters to believe that [the judicial candidate] will decide any issues or cases in a predetermined manner." [122] Shortly after its creation, the Committee publicly criticized Georgia Court of Appeals candidate Howard Mead for his television ads depicting his opponents as "high-priced criminal defense lawyers . . . [who now] work for the kind of people they once sent to jail [when they were prosecutors]."[123]

D. Recommendation # 4

A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.

Recommendation # 5

A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

Neither the O.C.G.A. nor the Georgia Code of Judicial Conduct explicitly mentions the appropriate course of action that judges should take when confronted with "ineffective lawyering" by defense counsel or "prosecutorial misconduct." Both the O.C.G.A. and Georgia Code of Judicial Conduct, however, require judges to take some kind of action when attorneys make prejudicial statements before the court.[124] The Georgia Code of Judicial Conduct also advises judges to "take appropriate action" when they receive information indicating a "substantial likelihood" that an attorney has committed a

---

[120] Jonathan Ringel, *Lawyers Form Watchdog Group to Eye Judicial Races*, FULTON COUNTY DAILY REP., April 23, 2004, at 1; Bill Rankin, *Group to Be Watchdog of Judicial Campaigns*, ATLANTA J. CONST., April 23, 2004, at D7.

[121] Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

[122] Ringel, *supra* note 120, at 1.

[123] Ringel, *supra* note 111.

[124] GA. CODE OF JUD. CONDUCT Canon 3(B)(6) (2005); O.C.G.A. § 17-8-75 (2005).

violation of the Standards of Conduct of the State Bar of Georgia.[125] Appropriate action includes: "direct communication with the . . . [attorney] who has committed the violation, or other direct action if available, and reporting the violation to the appropriate authority or other agency or body." [126] If an attorney's violation of the Standards of Conduct raises a "substantial question of the [attorney's] fitness as a[n] [attorney] and . . . the violation is actually known to the [] judge," the judge must report the violation to the State Bar of Georgia.[127]

We were unable to ascertain the types of measures taken by judges to remedy the harm caused by "ineffective lawyering" by defense counsel or "prosecutorial misconduct" or to prevent harm from occurring in the future.

E. Recommendation # 6

Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.

Neither the O.C.G.A. nor the Code of Judicial Conduct explicitly requires judges to ensure that defendants are provided with full discovery in all capital cases, but Canon 3 requires judges to be "faithful to the law" and perform their judicial duties fairly and impartially,[128] which one could argue would include enforcing existing discovery laws and ensuring that defendants are provided with full discovery in capital cases.

Additionally, in certain instances, the O.C.G.A. explicitly requires judges to enforce the requirements of "reciprocal discovery." The Georgia Legislature, in 1994, adopted the Criminal Procedure Discovery Act, in an effort to provide for the "comprehensive regulation of discovery and inspection in criminal cases."[129] In all criminal cases, including capital cases,[130] in which at least one felony offense is charged, defendants may elect to participate in "reciprocal discovery" of witnesses, statements, reports, and evidence.[131] If the defendant elects to participate, but s/he or the state fails to comply

---

[125] GA. CODE OF JUD. CONDUCT Canon 3(D)(2) (2005). For examples of how defense counsel and prosecutors can violate the Standards of Conduct of the State Bar of Georgia, see GA. RULES OF PROF'L CONDUCT R. 1.1 (requiring lawyers to provide competent representation to their clients; noting that the maximum penalty for violating Rule 1.1 is disbarment), and GA. RULES OF PROF'L CONDUCT R. 3.8 (highlighting the special responsibilities of a prosecutor, including the disclosure of evidence to defense counsel, while noting that the maximum punishment for a violation of Rule 3.8 is a public reprimand).

[126] GA. CODE OF JUD. CONDUCT Canon 3(D)(2) cmt. (2005).

[127] *Id.*

[128] GA. CODE OF JUD. CONDUCT Canon 3 (2005).

[129] 1994 Ga. Laws 1252. Prior to 1994, the State of Georgia did not have any comprehensive statute or rule pertaining to discovery in criminal cases. *See* State v. Lucious, 518 S.E.2d 677, 679 (Ga. 1999).

[130] If a capital defendant opts to participate in reciprocal discovery, it will apply to both the guilt/innocence phase and the sentencing phase, but not to pre-sentencing hearings. *See* O.C.G.A. § 17-16-2(e) (2005).

[131] O.C.G.A. §§ 17-16-2, -4 (2005). In cases in which at least one felony is charged which was docketed, indicted, or in which an accusation was returned prior to January 1, 1995, the defendant may participate in reciprocal discovery only if both the defendant and the prosecuting attorney agree in writing to participate.

with the requirements of "reciprocal discovery,"[132] the judge has the discretion to order the non-complying party to allow the discovery or inspection of discoverable materials,[133] or upon a showing of "prejudice and bad faith," the judge has the discretion to prohibit the introduction of the undisclosed evidence or prohibit the undisclosed witnesses from testifying.[134] On the issue of judicial discretion to remedy a party's noncompliance with the statute, Georgia courts have found that "in enacting [the reciprocal discovery] statute, the legislature did not impose a rigid formulation or grant an exclusive remedy for a defendant or a fatal consequence to the State for failure to comply with the discovery mandates. Instead, it cloaked the trial court with the discretion to use its own judgment to ensure a fair trial."[135]

In cases in which the defendant does not elect to participate in "reciprocal discovery," the defendant is only entitled to the discovery afforded "by the Georgia and United States Constitutions, statutory exceptions to the Act, and non-conflicting rules of court."[136] This does not include discovery of the state's scientific reports, scientific work product, or trial witness lists.[137]

Although it appears that the discovery available to defendants who do not opt into the reciprocal discovery statute is extremely limited, we were unable to obtain sufficient information to assess whether judges are doing all within their power ensure that these defendants are provided with full discovery in capital cases. Similarly, we were unable to assess whether judges are doing all within their power to enforce the requirements of reciprocal discovery to ensure full discovery in capital cases.

See O.C.G.A. § 17-16-2(e) (2005). If such defendant does not opt to participate in reciprocal discovery, s/he has a right to the discovery afforded in sections 17-16-20 through 17-16-23 of the Official Code of Georgia Annotated. *See* O.C.G.A. §§ 17-16-20, -21, -22, -23 (2005).

[132] The requirements for participating in "reciprocal discovery" are listed in sections 17-16-4 through 17-16-8 of the Official Code of Georgia Annotated. *See* O.C.G.A. §§ 17-16-4, -5, -6, -7, -8 (2005).

[133] O.C.G.A. § 17-16-6 (2005).

[134] *Id*.

[135] Clark v. State, 610 S.E.2d 165, 168 (Ga. Ct. App. 2005) (citing Blankenship v. State, 494 S.E.2d 758 (Ga. Ct. App. 1997)).

[136] State v. Lucious, 518 S.E.2d 677, 681 (Ga. 1999).

[137] *Id*.; Blevins v. State, 606 S.E.2d 624, 628 (Ga. Ct. App. 2004) (noting that the defendant is entitled to the list of witnesses from the grand jury).

CHAPTER TWELVE

THE TREATMENT OF RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the U.S. Supreme Court held in *McCleskey v. Kemp*[1] that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systematic racial disparity in death penalty implementation.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty; ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely all-white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that we identify the various ways in which race infects the administration of the death penalty and that we devise strategies to root out discriminatory practices. Until that time, executions should not proceed.

---

[1] 481 U.S. 279 (1987).

I. FACTUAL DISCUSSION

The issue of racial and ethnic discrimination in the administration of the death penalty was brought to the forefront of the death penalty debate in the State of Georgia by the United States Supreme Court's decision in *McCleskey v. Kemp*.[2] Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodwroth ("the Baldus study"), McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.[3] The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in McCleskey's case.[4]

On February 1, 1993, just five years after the Court's decision in *McCleskey*, the Georgia Supreme Court established the Commission on Racial and Ethnic Bias in the Court System (Commission) to:

1. Ascertain the perception of the public and the courts on the treatment of minorities and ethnic groups, as well as examine courtroom treatment and the extent to which minorities and ethnic groups voluntarily use the court system.
2. Study the administration and personnel policies of the courts, particularly looking at the representation of minorities and ethnic groups. Also, review the selection and employment processes for judicial and nonjudicial positions.
3. Investigate the impact of bias in both the criminal and civil justice processes.
4. Review any other areas it deems appropriate to complete its investigation.[5]

The Commission collected information on these issues through a number of avenues, including public hearings, forums, interviews, surveys, and preexisting studies.[6] The Commission's investigation resulted in a number of findings evidencing that "there are still areas within the state where members of minorities, whether racial or ethnic, do not receive equal treatment from the legal system."[7] The Commission's report, *Let Justice be Done: Equally, Fairly, and Impartially*, which was released in August 1995, discussed the Commission's findings and included over 100 recommendations focusing on

---

[2] *Id.*
[3] *Id.* at 291-92
[4] *Id.* at 297.
[5] See Georgia Supreme Court Commission on Racial and Ethnic Bias in the Court System, *Let Justice Be Done: Equally, Fairly, and Impartially*, 12 GA. ST. U. L. REV. 687, 695 (1996) [hereinafter Commission on Racial and Ethnic Bias].
[6] *Id.* at 695.
[7] *Id.* at 699.

correcting the identified problems and educating the public about the workings of the court system.[8]

The Commission's investigation of the criminal justice processes, however, did not include an assessment of the impact of racial bias in the administration of the death penalty. On this issue, the Commission stated as follows:

> The large number of factors involved in a death penalty decision, as pointed out in the Baldus study, combined with the numerous entities involved in these decisions, as noted by Justice Powell in *McCleskey*, are beyond the resources of the Commission to adequately assess. Nor can this Commission solve the political debate over the appropriateness of the use of the death penalty in our society. Instead, we have sought to concentrate on how justice system participants can be well informed as to the data, how the adversary process can be improved to equalize resources of the defense and prosecution, how to ensure that only legal factors are used in justice system decision-making, and how to obtain the best representative and least biased individuals as justice system officials and jurors. The other recommendations throughout this report should help to achieve these goals.[9]

Following the release of the Commission's report, the Georgia Supreme Court established the "Commission on Equality,"[10] which was recently renamed as the "Georgia Commission on Access and Fairness in the Courts,"[11] to implement the Commission's recommendations.[12] The extent to which the Commission's recommendations have been implemented will be discussed below in the Analysis Section.

---

[8] *Id.* at 781.

[9] *Id.* at 801.

[10] The Georgia Supreme Court established the "Commission on Equality" by combining the Commission on Racial and Ethnic Bias in the Courts with the Committee for Gender Equality. *See* Judicial Branch of Georgia, Administrative Office of the Courts, History, *at* http://www.georgiacourts.org/agencies/gcafc/index.html (last visited on Oct. 7, 2005).

[11] The mission of the "Georgia Commission on Access and Fairness in the Courts" remains the same, but "the name change reflects the expanded role of the Commission to address issues of fairness and accessibility, including access for individuals with various forms of disabilities." *See Id.*

[12] *Id.* The Commission on Equality was also charged with implementing the recommendations made in the Final Report of the Supreme Court Committee for Gender Equality. *Id.*

II. ANALYSIS

A. Recommendation #1

Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.

Between February 1, 1993 and August 1995, the State of Georgia, through the Georgia Supreme Court's Commission on Racial and Ethnic Bias in the Court System, investigated the impact of racial bias in the criminal justice system and made recommendations to "correct[] any problems or misconceptions that exist within the court system and to assure equal opportunity and treatment now and in the future."[13] The Commission's investigation included but was not limited to legal representation, pre-trial release, juries and jury pools, and sentencing,[14] but it did not include an assessment of the impact of racial discrimination in death penalty sentencing.

To perform the investigation, the Commission held six public hearings, conducted several interviews and surveys, and reviewed a number of studies.[15] Some of the Commission's observations and findings relevant to the criminal justice processes include:

1. The proportion of racial and ethnic minorities in Georgia's judiciary is far smaller than the proportion of minorities in the State's population (only 6% of Georgia's 986 judges were African-American).[16]
2. The racial composition of the district attorneys' and solicitors' offices does not reflect the demographics of Georgia's population.[17]
3. Some anecdotal evidence suggested that racial and ethnic minorities are more likely to plead guilty (even though they may perceive they have a valid defense) without fully understanding the immediate and long-term consequences.
4. The Commission's Attorney Attitude Survey indicated that unnecessary and inappropriate references to race and ethnicity have been made during criminal trials.[18]
5. There is a perception among lawyers and lay persons alike that lawyers on occasion wrongfully use peremptory strikes to remove potential jurors from jury panels for racial reasons.[19]

---

[13] *See* Commission on Racial and Ethnic Bias, *supra* note 5, at 694.
[14] *Id.*
[15] *Id.* at 695-96.
[16] *Id.* at 711.
[17] *Id.* at 781.
[18] *Id.* at 783.
[19] *Id.* at 813.

6. The Commission expressed concern over the fact that "the number of persons receiving a death sentence or charged with a death penalty offense is disproportionately African-American."[20]

For each of these findings, the Commission provided a corresponding recommendation. For example, with respect to #1, the Commission made the following recommendation: "All judges, attorneys, and court personnel should not make any reference to race, ethnicity, religion, or other such factors unless directly relevant and necessary for the case at hand."[21] Similarly, in an effort to address the concerns of #2, the Commission recommended, "District attorneys' and solicitors' offices, as well as public defenders' offices, should be encouraged to increase efforts at hiring racial and ethnic minority personnel throughout all employment levels in their offices."[22]

Although the Commission's report included a number of findings and recommendations, the number of recommendations that have effectively been implemented in the State of Georgia is questionable. For example, as of 2002, the percentage of Georgia judges who were African-American remained the same;[23] only 6 percent of all Georgia judges were black, which is far short of the 28 percent of the overall state population.[24] Similarly, as of August 1998, fifty-five of the 119 inmates on Georgia's death-row were black and of the 88 persons awaiting death penalty trial, 53 were black males, 26 were white males, 2 were black females, 4 were white females, and 3 were Hispanic males.[25] Based on this information, it appears that the State of Georgia needs to reexamine the impact of racial discrimination in the criminal justice system, thoroughly investigate the impact of racial discrimination in capital sentencing, and develop new strategies to eliminate racial discrimination.

Given that the State of Georgia has previously examined the impact of racial discrimination in its criminal justice system, but needs to develop new strategies that strive to eliminate the impact of racial discrimination, the State of Georgia is only in partial compliance with Recommendation #1.

---

[20] *Id.* at 799.

[21] *Id.* at 738; *see also id.* at 781 (recommending on the issue of diversity among prosecutors that "[d]istrict attorneys' and solicitors' offices, as well as public defenders' offices, should be encouraged to increase efforts at hiring racial and ethnic minority personnel throughout all employment levels in their offices").

[22] *Id.* at 782.

[23] *See* Walter C. Jones, *The Percentage of Georgia Judges Who Are Black Remains Small*, SAVANNAH MORNING NEWS, May 19, 2002.

[24] *See id.*

[25] Michael Mears, Georgia Capital Defender Office, *Georgia Needs a Racial Justice Act*, *at* http://www.gacapdef.org/docs/articles_mears_racial_justice_act.htm (last visited on Oct. 7, 2005).

B. Recommendation #2

Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potentially capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.

To the best of our knowledge, the State of Georgia is not currently collecting or maintaining data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potentially capital cases at all stages of the proceedings. The State of Georgia, however, does require trial judges to complete "trial judge reports" in cases in which a sentence of death is imposed.[26] The trial judge report, which is a multi-page questionnaire, requires judges to provide information on the race of the defendant and victim, the circumstances of the offense, the aggravating and mitigating circumstances, and whether race was an issue at trial,[27] but it does not request information on the nature or strength of the evidence.

Additionally, the Georgia Department of Corrections collects data on and compiles monthly profiles of the prisoners currently serving death sentences.[28] The profiles consist of the following data: age, race, marital status, parental status, religious affiliation, home county, socioeconomic class, childhood environment (rural vs. urban), guardian status as child, employment before prison, age at admission to prison, disciplinary records, number of transfers or escape attempts, education attained, testing and IQ score, substance abuse data, mental and physical health data, criminality and substance abuse in family, abuse as a child, absenteeism of parents as a child, and the results of HIV and tuberculosis tests.[29] These profiles do not include information on the race of victim, aggravating or mitigating circumstances, or on the nature and strength of evidence presented at trial.

Interestingly, the Commission on Racial and Ethnic Bias in the Court System discussed in its report the State of Georgia's collection (or lack thereof) of criminal data. Specifically, the report stated that "[t]here is a pervasive lack of adequate [criminal] data from which conclusions and policy decisions could be made. The Commission had

---

[26] *See* O.C.G.A. § 17-10-35(a) (2004); Green v. State, 242 S.E.2d 587 (Ga. 1978) (placing duty upon trial judge, not defendant, in death penalty case to prepare trial report).

[27] Supreme Court of Georgia, Unified Appeal Report of the Trial Judge, *at* http://www2.state.ga.us/Courts/Supreme/rules_UAP/uasect6.htm (last visited on Oct. 7, 2005).

[28] Georgia Department of Corrections, Death Penalty, *at* http://www.dcor.state.ga.us/CORRINFO/ResearchReports/DeathPenalty.html (last visited on Sept. 12, 2005).

[29] Georgia Department of Corrections, Inmate Statistical Profile, *at* http://www.dcor.state.ga.us/pdf/uds05-08.pdf (last visited on Sept. 12, 2005).

wanted to investigate potential racial disparities among persons convicted for offenses such as criminal trespass or simple burglary. Limitations in the available databases precluded such analyses."[30] As a result of these findings, the Commission recommended that "[a]ll criminal justice databases [] be re-designed so as to provide for substantial policy analysis. These databases should begin to include information deemed relevant to issues identified as sources of potential racial disparity (e.g., type of representation)."[31] It is unclear whether any state bodies, such as the Department of Corrections or the State Board of Pardons and Paroles, have re-designed their respective databases to include "information deemed relevant to issues identified as sources of potential racial disparity."

The State of Georgia, therefore, is only in partial compliance with Recommendation #2, as it only collects trial level data on defendants sentenced to death and does not collect data for all potential capital cases at every stage of the proceedings.

C. Recommendation #3

> **Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.**

To the best of our knowledge, the State of Georgia is not currently collecting and reviewing all valid studies already undertaken to determine the impact of racial discrimination on the death penalty nor is it identifying and carrying out any additional studies that would help determine discriminatory impacts on capital cases. Ten years ago, when investigating the impact of racial bias in the criminal justice system, the Commission on Racial and Ethnic Bias in the Court System reviewed certain studies that had already been undertaken, including some focusing on the death penalty,[32] but it did not review all valid studies already undertaken to assess the impact of racial bias on the administration of the death penalty nor did it collect data by race for any aspect of the death penalty.[33] Based on this information, the State of Georgia is not in compliance with Recommendation #3.

---

[30] Commission on Racial and Ethnic Bias, *supra* note 5, at 788.

[31] *Id.* at 790

[32] *Id.* at 766, 799 (referencing the following studies: a 1990 study conducted by the Sentencing Project, a 1993 Sociological Quarterly paper by J. Kramer and D. Steffensmeir, and the Baldus Study).

[33] *Id.* at 801 (noting that "[t]he large number of factors involved in a death penalty decision, as pointed out in the Baldus study, combined with the numerous entities involved in these decisions, as noted by Justice Powell in *McCleskey*, are beyond the resources of the Commission to adequately assess") (emphasis added).

D. Recommendation #4

Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.

"[A]s of May 3, 1995, there were 106 persons awaiting execution on death row in Georgia. Of these inmates 60 are white and 46 are black. One hundred twenty-two persons were awaiting trial on death penalty offenses as of June 1995. The racial composition of these individuals included 63 black males, 45 white males, one black female and one white female (race was unknown for twelve males)." [34] Referencing these figures, the Commission on Racial and Ethnic Bias in the Court System (Commission) expressed "concern" in its report over the fact that "the number of persons receiving a death sentence or charged with a death penalty offense is disproportionately African-American."[35] The Commission, however, did not recommend any remedial or preventive strategies to address these racial disparities.

Since the release of the Commission's report in August 1995, it does not appear as if the racial disparities identified as a "concern" by the Commission have at all diminished. A recent study that reviewed death sentencing in Georgia between 1989 and 1998 found that "both the race of the defendant and the race of the victim predict who is sentenced to death [in Georgia], with white suspects and those who kill white victims being more likely to be sentenced to death than black defendants and those who kill black victims."[36] The study also found that "those suspected of killing whites are 4.56 times as likely to be sentenced to death as those who are suspected of killing blacks."[37] Despite these figures, it does not appear that the State of Georgia is currently developing remedial and preventative strategies to address the apparent racial disparities in the administration of the death penalty. The State of Georgia, therefore, fails to meet the requirements of Recommendation #4.

E. Recommendation #5

Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.

---

[34] *Id.* at 799.
[35] *Id.*
[36] Raymond Paternoster, Glen Pierce, & Michael Radelet, *Race and Death Sentencing in Georgia, 1989-1998*, *in* AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT app., at S-T (2006).
[37] *Id.*

The State of Georgia has not adopted legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. Therefore, the State of Georgia is not in compliance with Recommendation #5. It should be noted, however, that during the 1999-2000 and 2003-2004 legislative sessions of the General Assembly, bills entitled the "Georgia Racial Justice Act" were introduced, but on both occasions, the bill died before making it to the House floor for a vote.[38]

F. Recommendation #6

> **Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any State actor found to have acted on the basis of race in a capital case.**

The State of Georgia, through the Georgia Commission on Access and Fairness in the Courts, has implemented educational programs and materials dealing with race. Among the educational materials is a video and teaching guide entitled, "Let Justice Be Done,"[39] which aims to increase racial sensitivity among judges and other leaders in the judicial system,[40] and two handbooks entitled, "Guide to Bias-Free Communication," which contains several suggestions for bias-free communication, and the "Court Conduct Handbook," which is to be used by all court personnel in an effort to eliminate bias in all forms from Georgia's courts.[41]

Additionally, a number of law enforcement organizations and certification bodies recommend or require that law enforcement agencies adopt policies on racial sensitivity. For example, the Commission on Accreditation for Law Enforcement Agencies (CALEA) and the Georgia Law Enforcement Certification Program (GLECP)[42] require

---

[38] H.B. 129, Georgia Racial Justice Act, Gen. Assem., 2003-04 Sess. (Ga. 2003), *available* at http://www.legis.state.ga.us/legis/2003_04/sum/hb129.htm (last visited on Oct. 7, 2005); H.B. 137, Georgia Racial Justice Act, Gen. Assem., 1999-2000 Sess. (Ga. 1999), *available* at http://www.legis.state.ga.us/legis/1999_00/leg/fulltext/hb137.htm (last visited on Oct. 7, 2005).

[39] Publications available through the Administrative Office of the Courts, Judicial Branch of Georgia, Georgia Commission on Fairness and Access in the Courts, *at* http://www.georgiacourts.org/agencies/gcafc/publications.html (last visited on Oct. 9, 2005).

[40] *Id.* "Let Justice Be Done" has been presented to the Institute of Continuing Judicial Education of Georgia, the Chief Justice's Commission on Professionalism, the Atlanta Bar Judicial Section, and the Tenth Annual Meeting of the National Consortium of Tasks Forces and Commissions on Racial and Ethnic Bias in the Courts. *Id.*

[41] *Id.*

[42] Ninety police, sheriff's, state law enforcement, transportation police, and university police departments have obtained certification under the GLECP. GEORGIA LAW ENFORCEMENT CERTIFICATION PROGRAM: STANDARDS MANUAL, at intro. (3d ed. 2002) [hereinafter GLECP STANDARDS] (noting that the Georgia Law Enforcement Certification Program was established in 1997 as a stepping-stone to national accreditation under CALEA's Standards for Law Enforcement Agencies); Georgia Association of Chiefs of

certified police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Georgia to establish a written directive that prohibits bias-based profiling and requires training on how to avoid biased-based profiling.[43]

The Georgia Association of Chiefs of Police also has adopted a "Sample Law Enforcement Operations Manual" (SLEOM), which contains professional standards and requirements for law enforcement operations.[44] These standards are meant only as a sample policy that may be used in an individual law enforcement agency's policy and procedures manual and may be modified as appropriate.[45] The SLEOM includes a proposed policy for adoption by law enforcement agencies in Georgia that defines "racial profiling" as "any law enforcement-initiated action that relies upon the race or ethnicity of an individual, rather than the behavior of that individual."[46] This proposed policy also suggests that adopting law enforcement agencies should "develop and deliver training to all officers to provide guidance regarding the consideration of race and ethnicity in the agency's law enforcement activities."[47] The SLEOM also suggests that adopting law enforcement agencies should "conduct periodic performance reviews of officer conduct to insure compliance with this policy," and subject those in violation of the policy to disciplinary action.[48] The extent to which Georgia law enforcement agencies have adopted the SLEOM is unknown.

All Georgia "peace officers,"[49] however, are statutorily required to meet certain criteria[50] and complete a basic course[51] at a Georgia Peace Officer Standards and Training Council

---

Police, State Certified Agencies, *at* http://www.gachiefs.com/statecertification/StateCertifiedAgencies.html (last visited on Jan. 9, 2006).

43 GLECP STANDARDS, *supra* note 42, at 7 (Standard 1.18).

44 *See* GA. ASS'N OF CHIEFS OF POLICE, SAMPLE LAW ENFORCEMENT OPERATIONS MANUAL [hereinafter SLEOM], *available at* http://www.gachiefs.com/Sample%20LE%20Manual/VCH20Racial%20Profiling.doc (last visited on Oct. 14, 2005).

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 A "peace officer" is defined, for the purposes of this Section, as "an agent, operative, or officer of this state, a subdivision or municipality thereof, . . . who, as an employee for hire or as a volunteer, is vested either expressly by law or by virtue of public employment or service with authority to enforce the criminal or traffic laws through the power of arrest and whose duties include the preservation of public order, the protection of life and property, and the prevention, detection, or investigation of crime." *See* O.C.G.A. § 35-8-2(8)(A) (2005).

50 O.C.G.A. § 35-8-8(a) (2005). One must (1) be at least 18 years of age; (2) be a citizen of the United States; (3) have obtained a high school diploma or the recognized equivalent; (4) not have been convicted of any state or federal felonies or sufficient misdemeanors to establish a pattern of disregard for the law; (5) be fingerprinted for a background check; (6) possess good moral character; (7) complete an oral interview; (8) be found free from an adverse physical, emotional, or mental condition; and (9) successfully complete the basic training course entrance examination. *Id.*; *see also* GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL R. 464-3-.02(a) (2005), *available at* http://www.gapost.org/5Trng.htm (last visited on Oct. 4, 2005)

(POST) certified academy.[52] The mandatory basic course consists of 404 hours of training, including such relevant areas as "cultural diversity."[53] "Cultural diversity" instruction consists of training on racial sensitivity in all law enforcement activities.[54] After the completion of basic training, all law enforcement officials must complete 20 hours of additional "cultural sensitivity" training each subsequent year.[55]

Although the Georgia Commission on Access and Fairness in the Courts offers programs and materials on race, all of the programs and materials focus on the judicial branch (judges and court personnel). Similarly, the POST Council mandates training regarding "cultural diversity" only for all law enforcement officials. However, neither of these programs directly pertain to the death penalty system, nor do they provide training to all parts of the criminal justice system.

Additionally, CALEA and GLECP only pertain to certified police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments and the contents and scope of the training on racial profiling is unknown. Moreover, although the SLEOM provides a sample policy for prohibiting racial profiling, training law enforcement officials on the consideration of race and ethnicity in the agency's law enforcement activities, and disciplinary measures for violation of the policy, the number of law enforcement agencies in Georgia that have adopted this policy is unknown.

The State of Georgia, therefore, is only in partial compliance with Recommendation #6.

G. Recommendation #7

Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during *voir dire*.

The State of Georgia does not require defense attorneys to participate in training to identify and develop racial discrimination claims in capital cases and identify biased jurors during *voir dire*.

---

[51] O.C.G.A. § 35-8-9(a) (2005); GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL R. 464-3-.03(a) (2005), *available at* http://www.gapost.org/5Trng.htm (last visited on Oct. 4, 2005).

[52] O.C.G.A. § 35-8-11 (2005).

[53] GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, 404 HOUR BASIC LAW ENFORCEMENT TRAINING COURSE (11th ed. 2003) [hereinafter POST COUNCIL BASIC TRAINING COURSE] (table of contents), *available at* http://www.gapost.org/pdf_file/bletc404.pdf (last visited on Oct. 4, 2005) (The curriculum for this training course, as produced by the POST Council, is the minimum level of instruction and training for law enforcement officials required to be taught at POST-certified training academies.).

[54] Telephone Interview with Ryan Powell, Director of Training, Georgia Peace Officer Standards and Training Council (Oct. 12, 2005).

[55] *Id.*

The Office of the Georgia Capital Defender, however, offers two major death penalty seminars each year, both of which emphasize issues of race in capital litigation.[56] The Unified Appeal Procedure Checklist and the Georgia Public Defender Standards Council's Death Penalty Defense Standards[57] also provide guidance to defense attorneys on raising issues of racial bias during jury selection.[58]

Although training on issue of race in capital litigation may be available, the State of Georgia does not require defense counsel to participate in training to specifically identify and develop racial discrimination claims in capital cases and to identify biased jurors during *voir dire*. The State of Georgia is, therefore, not in compliance with Recommendation #7.

H. Recommendation #8

> **Jurisdictions should require jury instructions that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.**

On the issue of the impact of race on jurors' decision making, the Commission on Racial and Ethnic Bias in the Court System found as follows:

> Over 81% of minority attorneys and 58% of whites shared the perception that verdicts are influenced by jurors' racial stereotypes. The following are *typical* of the comments made by respondents.

---

[56] *See, e.g.*, Georgia Capital Defender, Annual Capital Defense Training Seminar, "We Who Believe In Justice Cannot Resist," Agenda (July 8-9, 2005) (on file with author).

[57] In April 2005, the Georgia Public Defender Standards Council (GPDSC) adopted as the "GPDSC Death Penalty Defense Standards," the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines). *See* GA. PUB. DEFENDER STANDARDS COUNCIL, DEATH PENALTY DEFENSE STANDARDS [hereinafter DEATH PENALTY DEFENSE STANDARDS], *at* http://www.gidc.com/cpdsystem-standards-death_penalty_case.pdf (last visited on Oct. 7, 2005); ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEATH PENALTY CASES, *at* http://www.gpdsc.com/cpdsystem-standards-aba_dp_guidelines.pdf (last visited on Oct. 7, 2005); GA. PUB. DEFENDER STANDARDS COUNCIL, FINAL PAGE OF DEATH PENALTY DEFENSE STANDARDS, *at* http://www.gidc.com/cpdsystem-standards-death_penalty_case_final_page.pdf (last visited on Oct. 7, 2005). All standards adopted by the GPDSC that are determined by the General Oversight Committee to have a "fiscal impact" are not effective until ratified by joint resolution of the General Assembly and upon approval of the resolution by the Governor or upon its becoming law without his/her approval. *See* O.C.G.A. 17-12-8(c) (2005). We have been told that the standards have been determined to have a "fiscal impact," thus requiring ratification by the General Assembly to become effective. *See* Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author); s*ee also* Georgia Public Defender Standards Council, 2005 Legislative Session Report #8, *at* http://www.gpdsc.com/resources-legislation-update_04-05-05.htm (last visited on Oct. 7, 2005) (noting the General Oversight Committee "determined that all of the standards adopted [as of March 23, 2005] by the [GPDSC] have a fiscal impact").

[58] GA. UNIFIED APPEAL P. CHECKLIST pt. I(I)(4), (Q), II(A), *available at* http://www2.state.ga.us/Courts/Supreme/uasect5.htm (last visited on Jan. 9, 2006); DEATH PENALTY DEFENSE STANDARDS, *supra* note 57 (ABA Guideline 10.10.2).

> "Race, among other factors, is one of the factors jurors consider. I have lost/won jury trials on this basis."
>
> "To the extent that a county is predominantly black, white, etc., the jury pool will reflect that, and jurors seem to favor litigants of their own race."
>
> "White jurors favor white litigants. Black jurors favor black litigants over white litigants."
>
> "A jury trial. Jurors carry bias into the courtroom."[59]

Despite these findings, neither the Georgia Suggested Pattern Jury Instructions—Criminal Cases nor Georgia case law requires jury instructions informing jurors that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations. The State of Georgia, therefore, fails to meet the requirements of Recommendation #8.

I. Recommendation #9

> **Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision making could be affected by racially discriminatory factors.**

Canon 3 of the Georgia Code of Judicial Conduct requires judges to "disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including . . . where: the judge has a personal bias or prejudice concerning a party or a party's lawyer."[60] However, the number of judges who have actually disqualified themselves due to racial bias or prejudice is unknown. Based on the report of the Commission on Racial and Ethnic Bias in the Court System, it appears that some judges have failed to properly disqualify themselves. The report notes that between 1972 and about 1995, sixty-nine complaints alleging racial bias on the part of the judge were filed with the Judicial Qualifications Commission (JQC).[61] While of the sixty-nine complaints sixty-five were found to be without merit, three resulted in private reprimand and one resulted in formal action against a judge.[62]

---

[59] Commission on Racial and Ethnic Bias, *supra* note 5, at 811 (emphasis added).

[60] GA. CODE OF JUD. CONDUCT Canon 3(E)(1)(a); *see also* GA. CODE OF JUD. CONDUCT Canon 3(B)(5) (requiring judges to perform their judicial duties without "bias or prejudice . . . including but not limited to bias or prejudice based upon race").

[61] Commission on Racial and Ethnic Bias, *supra* note 5, at 730-31.

[62] *Id.*; *see also* Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases*, 21 CHAMPION 19, 21 (1997) (citing Isaacs v. State, 355 S.E.2d 644 (Ga. 1987), in which the Georgia Supreme Court "held that a judge should be disqualified from a case because he actively opposed a motion to recuse him[self]" without mentioning that "the motion to recuse was based primarily on the judge's long history of racial discrimination").

Based on this information, Canon 3 does not appear to sufficiently ensure that judges rightfully disqualify themselves. However, the Georgia Code of Judicial Conduct was amended in 1994 to prevent racial bias and prejudice from influencing judicial decision making. Specifically, Canon 3(B)(5) was amended to require judges to perform their duties without "bias or prejudice . . . including but not limited to bias or prejudice based upon race." The effect of this amendment on judicial decision making combined with the disqualification requirement is unknown. Thus, it is impossible to assess whether the current Canon 3 sufficiently ensures that judges rightfully disqualify themselves, as required by Recommendation #9.

J. Recommendation #10

> **States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.**

The State of Georgia does not make any exceptions to the normal procedural rules for claims of racial discrimination in the imposition of death sentences. Specifically, a defendant's failure to raise a claim of racial discrimination that could have been raised at trial or on appeal will preclude review in a subsequent habeas corpus proceeding unless the defendant can meet the "cause and prejudice test,"[63] or the granting of his/her habeas petition is necessary to avoid a "miscarriage of justice."[64] For example, all challenges to the composition of a grand or traverse jury, including those based on race, are deemed waived unless raised at the first proceeding after indictment or at any time thereafter as designated by the court.[65] Based on this information, the State of Georgia fails to comply with Recommendation #10.

---

[63] Black v. Hardin, 336 S.E.2d 754, 755 (Ga. 1985). In order to meet the "cause and prejudice" exception, the petitioner must show adequate cause for failure to raise the claims at trial or pursue the claim on appeal and show actual prejudice to the petitioner. *See* O.C.G.A. 9-14-48(d) (2004).

[64] *See* Head v. Ferrell, 554 S.E.2d 155, 160-61 (Ga. 2001).

[65] GA. UNIFIED APPEAL R. II(C)(5); Young v. State, 206 S.E.2d 439, 442 (Ga. 1974) (stating that "[t]he procedure in this state has long required a criminal defendant to raise a challenge to the jury lists at the time the jury is 'put on him' or else he waives his right to object"); Walraven v. State, 297 S.E.2d 278, 282 (Ga. 1982) (stating that "[f]ailure to announce at the first hearing that defendant does, in fact, intend to challenge the array of the grand jury might ordinarily bar a subsequent challenge. In this case, however, the court allowed appellant additional time to determine whether or not to make such a challenge").

CHAPTER THIRTEEN

MENTAL RETARDATION, MENTAL ILLNESS, AND THE DEATH PENALTY

INTRODUCTION TO THE ISSUE

Mental Retardation

The ABA unconditionally opposes imposition of the death penalty on offenders with mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held it unconstitutional to execute offenders with mental retardation.

This holding does not, however, guarantee that no one with mental retardation will be executed. The American Association on Mental Retardation defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5 percent of the population; if two or more of the person's adaptive skills are significantly limited; and if these two conditions were present before the person reached the age of 18. Unfortunately, some states do not define mental retardation in accordance with this commonly accepted definition. Moreover, some states impose upper limits on IQ that are lower than the range (approximately 70-75 or below) that is commonly accepted in the field. In addition, lack of sufficient knowledge and resources often preclude defense counsel from properly raising and litigating claims of mental retardation. And in some jurisdictions, the burden of proving mental retardation is not only placed on the defendant but also requires proof greater than a preponderance of the evidence.

Accordingly, a great deal of additional work is required to make the holding of *Atkins*, i.e., that people with mental retardation should not be executed, a reality.

Mental Illness

Although mental illness should be a mitigating factor in capital cases, juries often mistakenly treat it as an aggravating factor. States, in turn, often have failed to monitor or correct such unintended and unfair results.

State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under "extreme mental or emotional disturbance" at the time of the offense; (2) whether "the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication"; and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct."

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most jurors are likely to view mental illness incorrectly as an aggravating factor; indeed,

research indicates that jurors routinely consider the three statutory factors listed above as *aggravating*, rather than *mitigating*, factors in cases involving mental illness. One study found specifically that jurors' consideration of the factor, "extreme mental or emotional disturbance" in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a criminal defendant when it is considered in the context of determining "future dangerousness," often a criterion for imposing the death penalty. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. In fact, only a small percentage of mentally ill individuals are dangerous, and most of them respond successfully to treatment. But the contrary perception unquestionably affects decisions in capital cases.

In addition, the medication of some mentally ill defendants in connection with their trials often leads them to appear to be lacking in emotion, including remorse. This, too, can lead them to receive capital punishment.

Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial; it may provide a defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant.

I. FACTUAL DISCUSSION

A defendant charged with a capital offense may claim that s/he suffered or suffers from any of the following three mental conditions: (1) mental retardation, (2) insanity at the time of the offense, and/or (3) mental illness at the time of the offense.

A. Mental Retardation

Since 1989, the State of Georgia has prohibited the imposition and execution of death sentences against all mentally retarded offenders.[1] This prohibition occurred in two stages; the first involved the Georgia's Legislature adoption, in 1988, of statutory provisions prohibiting the application of the death penalty against certain mentally retarded offenders. The second involved the Georgia Supreme Court's 1989 constitutional ruling on this issue.

In 1988, Georgia became the first state to enact legislation prohibiting the execution of the mentally retarded. Specifically, the Georgia Legislature amended the statute pertaining to insanity and incompetency, section 17-7-131 of the O.C.G.A., by adding three new provisions which: (1) required the resolution of the issue of mental retardation during the guilt/innocence phase of a capital trial,[2] (2) prohibited the imposition of the death penalty against all defendants found "guilty but mentally retarded," and (3) provided for the imposition of life imprisonment for defendants found "guilty but mentally retarded."[3] These provisions, however, only apply to cases in which the death penalty is sought which commence "on or after" July 1, 1988,[4] and not to inmates who were on death row at the time the legislation was enacted.

Referencing these amendments to section 17-7-131 and the Georgia Senate's plea to the State Board of Pardons and Paroles to commute the death sentences of all mentally retarded inmates as evidence of a state consensus against the execution of the mentally retarded, the Georgia Supreme Court, in *Fleming v. Zant*,[5] found that the execution of the mentally retarded constituted cruel and unusual punishment under the Georgia Constitution.[6] The Court's decision outlined the procedures for considering claims of mental retardation raised by inmates whose death penalty cases commenced before July 1, 1988.[7]

---

1 O.C.G.A. § 17-7-131(a)(3)(C), (c)(3), (j) (2004).

2 *See, e.g.*, Jenkins v. State, 498 S.E.2d 502, 509 (Ga. 1998) (citing O.C.G.A.§ 17-7-131(c)(3), and noting that the issue of mental retardation must be resolved during the guilt/innocence phase).

3 O.C.G.A. § 17-7-131(a)(3), (c)(3), (j) (2004).

4 Fleming v. Zant, 386 S.E 2d 339, 340-41 (Ga. 1989).

5 *Id.* at 340, 341-42.

6 *Id.* at 342.

7 *Id.* at 342-43.

Although different procedures apply to claims of mental retardation based on when the case commenced, the same definition of mental retardation applies to all death penalty cases.[8]

1. Definition of Mental Retardation

The Georgia Code defines mental retardation as: (1) "significantly subaverage general intellectual functioning," (2) "resulting in or associated with impairments in adaptive behavior," which (3) "manifested during the developmental period."[9] The Georgia Supreme Court has found "an IQ of 70 or below" to be "an indication of significantly subaverage intellectual functioning."[10] However, the Georgia Supreme Court has further indicated that an individual cannot be "'positively' classified as mentally retarded on the basis of the score alone."[11] The Georgia Supreme Court has not defined "adaptive behavior," but does require impairments in adaptive behavior to occur before the age of 18.[12]

2. Procedures for Raising and Considering Mental Retardation Claims

To determine which procedures apply to each claim of mental retardation, the court must refer to the timing of the capital trial's guilt/innocence phase.[13] If the guilt/innocence phase occurred on or after July 1, 1988, then the procedures found in section17-7-131 of the O.C.G.A. apply. Alternatively, if the guilt/innocence phase occurred before July 1, 1988, then the procedures outlined by the Georgia Supreme Court in *Fleming v. Zant* apply.

a. Procedures for Trials Conducted on or after July 1, 1988

A defendant whose capital trial's guilt/innocence phase began on or after July 1, 1988, may raise the issue of mental retardation pre-trial, at trial, or post-trial.

i. Pre-Trial and Trial Determinations

A defendant whose capital trial's guilt/innocence phase commenced on or after July 1, 1988 has the option to do any of the following: (1) plead "guilty but mentally retarded;"[14] (2) plead not guilty and raise the issue of mental retardation during the guilt/innocence phase of his/her capital trial;[15] and/or (3) plead not guilty and present evidence of mental

---

[8] *Id.* at 343.
[9] O.C.G.A.§ 17-7-131(a)(3) (2004).
[10] Perkinson v. State, 610 S.E.2d 533, 537-38 (Ga. 2005); Head v. Ferrell, 554 S.E.2d 155 (Ga. 2001); Stripling v. State, 401 S.E.2d 500, 504 (Ga. 1991).
[11] Williams v. State, 455 S.E.2d 836, 838 (Ga. 1995); *Stripling*, 401 S.E.2d at 504.
[12] Head v. Stripling, 590 S.E.2d 122, 124 n.1 (Ga. 2003).
[13] Stephens v. State, 509 S.E.2d 605, 609 (Ga. 1998).
[14] O.C.G.A. § 17-7-131(b)(2) (2004).
[15] O.C.G.A. § 17-7-131 (2004).

retardation in mitigation during the sentencing phase of his/her capital trial.[16] Such defendants have a right to counsel and may be eligible for appointed counsel, if they can establish their indigency.[17]

If the defendant wishes to enter a plea of "guilty but mentally retarded," the court must assess whether there is a "sufficient" factual basis to support a finding that the defendant is mentally retarded.[18] To initiate this assessment, a licensed psychologist or psychiatrist must examine the defendant.[19] The court must then review the psychological or psychiatric report(s) and hold a hearing on the issue of the defendant's mental condition.[20] If the court is satisfied that there is a sufficient factual basis to find that the defendant is mentally retarded, the court may accept the plea of "guilty but mentally retarded"[21] and sentence the defendant to imprisonment for life.[22] Upon being sentenced to life imprisonment, a copy of the psychological or psychiatric report(s) must be forwarded to the Department of Corrections with the official sentencing document.[23]

In cases in which the defendant intends to raise the issue of mental retardation at the capital trial's guilt/innocence phase, s/he must file a "Notice of Intent of Defense to Raise Issue of Insanity, Mental Incompetence or Mental Retardation."[24] The notice must be filed at least ten days before the trial, unless the court adjusts the deadline.[25] Once filed, the judge must determine whether the issue requires any further medical examination of the defendant or any further non-jury hearing relative to the issue.[26] If necessary, the judge may order the defendant to be examined and/or hold a hearing on the issue of the defendant's mental condition.

During the guilt/innocence phase, the state must prove the defendant's guilt beyond a reasonable doubt and the defendant must prove his/her mental retardation beyond a reasonable doubt.[27] Specifically, the defendant must prove, beyond a reasonable doubt, that s/he "ha[s] significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period."[28] Both the state and the inmate may present any evidence relevant to the issue of the defendant's guilt/innocence and/or mental retardation that is

---

16 Burgess v. State, 450 S.E.2d 680, 695 (1994).
17 *See* O.C.G.A. §§ 17-12-127(a)-(b), -19.3, -121 (2005).
18 O.C.G.A. § 17-7-131(b)(2) (2005).
19 *Id.*
20 *Id.*
21 *Id.*
22 O.C.G.A. § 17-7-131(j) (2005).
23 *Id.*
24 GA. UNIF. SUPER. CT. R. 31.4.
25 GA. UNIF. SUPER. CT. R. 31.1.
26 GA. UNIF. SUPER. CT. R. 31.4.
27 O.C.G.A. § 17-7-131(c)(3) (2004); Mosher v. State, 491 S.E.2d 348, 352-53 (Ga. 1997) (upholding the constitutionality of requiring the defendant's mental retardation be proved beyond a reasonable doubt).
28 O.C.G.A. § 17-7-131(a)(3).

not unfairly prejudicial, cumulative, or otherwise excluded by Georgia evidentiary rules.[29]

At the close of evidence, the court must instruct the jury to consider the verdict of "guilty but mentally retarded" in addition to "guilty" and "not guilty."[30] The court also must instruct the jury as follows: "I charge you that should you find the defendant guilty but mentally retarded, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant."[31] The court, however, may not instruct the jury that a verdict of guilty but mentally retarded will preclude a death sentence.[32] If the jury finds the defendant "guilty but mentally retarded," the court must sentence the defendant to imprisonment for life.[33]

After the court accepts a plea of or the defendant has been found "guilty but mentally retarded," the defendant must be evaluated by a psychiatrist or a licensed psychologist from the Department of Human Resources.[34] If, based on the examination, the defendant is in need of immediate hospitalization, the defendant must be transferred to the Department of Human Resources.[35] Alternatively, if the defendant is not in need of immediate hospitalization, the defendant must be committed to an appropriate penal facility where s/he must be further evaluated and treated.[36] The defendant may be transferred to the Department of Human Resources at any time if such action is "psychiatrically indicated for his[/her] mental illness."[37]

If the defendant fails to prove during the capital trial's guilt/innocence phase that s/he is "guilty but mentally retarded," the defendant may present evidence regarding his/her mental retardation as a mitigating circumstance during the sentencing phase.[38] The judge, however, is not required to "single out" the defendant's alleged mental retardation as a mitigating circumstance in his/her jury instructions.[39]

ii. Post-Conviction Proceedings

If the defendant fails to raise the issue of mental retardation at trial, s/he may raise the issue in a petition for a writ of habeas corpus under the "miscarriage of justice" prong of

---

[29] Morrison v. State, 583 S.E.2d 873, 876 (Ga. 2003) (pre-1988 case); Zant v. Foster, 406 S.E.2d 74, 76 (Ga. 1991) (pre-1988 case); Burgess v. State, 450 S.E.2d 680 (Ga. 1994) (post-1988 case).

[30] O.C.G.A. § 17-7-131(c)(3) (2004); *see also* GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 209.40 (3d ed. 2004).

[31] O.C.G.A. § 17-7-131(b)(3)(C) (2004); *see also* GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 209.40 (3d ed. 2004).

[32] Heidler v. State, 537 S.E.2d 44, 55 (Ga. 2000); State v. Patillo, 417 S.E.2d 139, 141 (Ga. 1992).

[33] O.C.G.A. § 17-7-131(j) (2004).

[34] O.C.G.A. § 17-7-131(g)(1) (2004).

[35] O.C.G.A. § 17-7-131(g)(4) (2004).

[36] O.C.G.A. § 17-7-131(g)(2) (2004).

[37] O.C.G.A. § 17-7-131(g)(3) (2004).

[38] Burgess v. State, 450 S.E.2d 680, 695 (1994).

[39] *Id.*

the state habeas corpus statute.[40] The defendant must establish his/her mental retardation beyond a reasonable doubt[41] and the judge must determine whether the defendant meets this standard, "without intervention of the jury."[42] The defendant is not entitled to appointed counsel to assist with preparing the petition for a writ of habeas corpus.[43]

b. Procedures Applicable to Death Penalty Cases Conducted Before July 1, 1988

The Georgia Supreme Court, in *Fleming v. Zant*, outlined the procedures for considering claims raised by a defendant whose capital trial's guilt/innocence phase began before July 1, 1988.

An inmate whose capital trial's guilt/innocence phase commenced before July 1, 1988 may raise the issue of his/her mental retardation in a petition for a writ of habeas corpus.[44] The defendant is not entitled to appointed counsel to assist with preparing the petition.[45] The petition must be supported by at least one expert diagnosis of mental retardation[46] and filed in the county in which the inmate is incarcerated.[47]

The court may hold a hearing on the issue of the inmate's mental retardation or it may make its decision based on the petition and the supporting evidence.[48] Regardless of whether it holds a hearing, the court, in making its decision, must assess whether the inmate presented "sufficient credible evidence" to create a "genuine issue regarding the [inmate's] retardation."[49] If the court finds that there is a genuine issue of fact based on the evidence presented, then the court must grant the writ for the limited purpose of conducting a trial on the issue of the inmate's mental retardation.[50] This trial is commonly referred to as a "*Fleming* trial."

The purpose of a *Fleming* trial is to give the inmate the same right to litigate the issue of mental retardation that s/he would have had if his/her trial had been conducted on or after June 1, 1988.[51] As a result, the inmate has a right to appointed counsel as well as all

---

[40] Turpin v. Hill, 498 S.E.2d 52, 53 (Ga. 1998) (citing O.C.G.A.§ 9-14-48(d) (2004)); *see also* Head v. Hill, 587 S.E.2d 613, 618 (Ga. 2003) (stating a defendant may not raise the issue of mental retardation in a petition for a writ of habeas corpus if s/he raised the issue of mental retardation at trial and the jury rejected the verdict of not guilty but mentally retarded).

[41] O.C.G.A. § 17-7-131 (2004); *Head*, 587 S.E.2d at 618.

[42] *Hill*, 498 S.E.2d at 54; *Head*, 587 S.E.2d at 620.

[43] Gibson v. Turpin, 513 S.E.2d 186, 192 (Ga. 1999).

[44] Fleming v. Zant, 386 S.E 2d 339, 342-43 (Ga. 1989).

[45] *Gibson*, 513 S.E.2d at 192.

[46] *Fleming*, 386 S.E 2d at 342-43.

[47] O.C.G.A. § 9-14-43 (2004).

[48] *Fleming*, 386 S.E 2d at 342-43.

[49] *Id.*

[50] *Id.*

[51] Zant v. Foster, 406 S.E.2d 74, 76 (Ga. 1991) (overturned on other grounds).

other rights that "'would . . . have accrued to [him/her] because of his[/her] status as an accused during his[/her] initial trial.'"[52]

The *Fleming* trial must be held before a jury in the county where the original trial was held and must include a full evidentiary hearing on the issue of the inmate's mental retardation.[53] The inmate may not waive his/her right to a jury determination on the issue of mental retardation.[54]

During the trial, the inmate must establish his/her mental retardation by a preponderance of the evidence.[55] Both the state and the inmate may present any evidence relevant to the issue of the inmate's mental retardation that is not unfairly prejudicial, cumulative, or otherwise excluded by Georgia evidentiary rules.[56] This includes facts related to the crime, a transcript of the inmate's confession, and photographs of the crime scene.[57] This evidence, however, may be considered only for the limited purpose of determining whether the inmate is mentally retarded.[58]

After the presentation of evidence, the judge may not instruct the jury on the sentencing consequences associated with a finding of mental retardation.[59] Specifically, the judge may not inform the jury that if it finds the defendant to be mentally retarded, the defendant's death sentence will be reduced to a sentence of life imprisonment.[60]

If the jury finds by a preponderance of the evidence that the inmate is mentally retarded, by determining s/he "ha[s] significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period," his/her death sentence will be vacated and s/he will be sentenced to life imprisonment.[61]

---

52 *Id*.

53 *Fleming*, 386 S.E 2d at 342-43.

54 Rogers v. State, 575 S.E.2d 879, 882 (Ga. 2003) (noting that once a habeas corpus court finds a petitioner has adduced sufficient credible evidence of mental retardation to create an issue for a jury in a *Fleming* trial, the issue of mental retardation must be reviewed by the trial court and this trial is not subject to voluntary waiver).

55 *Fleming*, 386 S.E 2d at 342-43.

56 Morrison v. State, 583 S.E.2d 873, 876-77 (Ga. 2003); *Foster*, 406 S.E.2d at 76.

57 *Morrison*, 583 S.E.2d at 876; *see also Foster*, 406 S.E.2d at 76 (noting its disagreement with the trial court's pre-trial order excluding evidence of the underlying crime and the defendant's subsequent escape attempt).

58 *Morrison*, 583 S.E.2d at 877.

59 State v. Patillo, 417 S.E.2d 139, 141 (Ga. 1992); *see, e.g.*, Foster v. State, 525 S.E.2d 78, 79-80 (Ga. 2002).

60 *Patillo*, 417 S.E.2d at 141.

61 Fleming v. Zant, 386 S.E 2d 339, 342-43 (Ga. 1989); Rogers v. State, 583 S.E.2d 873 (Ga. 2003).

B. Mental Illness

In addition to a plea or jury verdict of "guilty but mentally retarded," a defendant with mental disabilities may plead "not guilty by reason of insanity" or "guilty but mentally ill"[62] or s/he may raise the issue of his/her insanity during his/her capital trial. Such defendant has a right to counsel and may be eligible for appointed counsel,[63] if s/he can establish that s/he is indigent.[64]

1. Definitions of Insanity and Mentally Ill

a. Definition of Insanity

A defendant is insane if:

(1) At the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence ("right and wrong test");[65] or

(2) At the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as [s/]he did because of a delusional compulsion as to such act which overmastered his[/her] will to resist committing the crime ("delusional compulsion test").[66]

Insanity does not include a mental state manifested only by repeated unlawful or antisocial conduct.[67]

b. Definition of Mentally Ill

"Mentally ill" means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary

---

[62] In July 1982, the Georgia Legislature adopted a new law allowing a defendant to plead "not guilty but mentally ill" or obtain a "guilty but mentally ill" verdict. GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 209.30 (3d ed. 2004). The new law only applies to cases where the offense occurred after July 1, 1982. *Id.*

[63] GA. UNIFIED APPEAL R. II(A)(1) (stating that two attorneys must be appointed in all capital cases).

[64] *See* O.C.G.A. §§ 17-12-19.3, -121 (2005).

[65] O.C.G.A. § 16-3-2 (2005); *see also* GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 209.10 (3d ed. 2004).

[66] *See* GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 209.20 (3d ed. 2004) (essentially reciting the standards for determining whether a person is insane under the above tests to the jury).

[67] O.C.G.A. § 17-7-131(a)(1) (2004).

demands of life.[68] The term "mentally ill" does not include a mental state manifested only by repeated unlawful or antisocial conduct.[69]

2. Pleas of Not Guilty By Reason of Insanity and Guilty But Mentally Ill

a. Plea of Not Guilty By Reason of Insanity

In order for the court to accept a plea of "not guilty by reason of insanity," the court must be satisfied that the defendant was insane at the time of the offense, as defined above.[70] To assess the defendant's sanity, the defendant must be examined by a licensed psychologist or psychiatrist.[71] The court must then review the psychological or psychiatrist report(s) and hold a hearing on the defendant's sanity.[72] If the court is satisfied that the defendant is "not guilty by reason of insanity," the court may accept the plea and adjudge the defendant "not guilty by reason of insanity."[73] A copy of the psychological or psychiatric report(s) must then be forwarded to the Department of Corrections with the official sentencing document.[74]

b. Plea of Guilty But Mentally Ill

To accept a plea of "guilty but mentally ill" the court must assess whether the defendant was mentally ill at the time of the offense, as discussed above.[75] To assess the defendant's mental illness, the defendant must be examined by a licensed psychologist or psychiatrist.[76] The court must then review the psychological or psychiatric report(s) and hold a hearing on the defendant's mental illness.[77] If the court is satisfied that the defendant was mentally ill at the time of the offense, the court may accept the defendant's plea of "guilty but mentally ill" [78] and sentence him/her in the same manner as a defendant found guilty of the offense.[79] After the defendant has been sentenced, a copy of the psychological or psychiatric report(s) must be forwarded to the Department of Corrections with the official sentencing document.[80]

---

[68] O.C.G.A. § 17-7-131(a)(2) (2004); *see also* GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 209.30 (3d ed. 2004).
[69] O.C.G.A. § 17-7-131(a)(2) (2004); *see also* Stripling v. State, 401 S.E.2d 500, 503-04 (Ga. 1991) (citing O.C.G.A. § 17-7-31(a)(2) (2005)); GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 209.30 (3d ed. 2004).
[70] O.C.G.A. § 17-7-131(b)(2.1) (2004).
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] O.C.G.A. § 17-7-131(i) (2004).
[75] O.C.G.A. § 17-7-131(a)(2) (2004).
[76] *Id.*
[77] *Id.*; *see also* Cullers v. State, 543 S.E.2d 763, 765 (Ga. Ct. App. 2000).
[78] O.C.G.A. § 17-7-131(a)(2) (2004).
[79] O.C.G.A. § 17-7-131(g)(1) (2004).
[80] O.C.G.A. § 17-7-131(i) (2004).

3. The Insanity or Otherwise Mentally Incompetent Defenses and the "Not Guilty By Reason of Insanity" and "Guilty But Mentally Ill" Verdicts

If the defendant intends to raise as a defense his/her insanity or mental incompetence at the time of the offense, the defendant must file a "Notice of Intent of Defense to Raise Issue of Insanity, Mental Incompetence or Mental Retardation."[81] The notice must be filed at least ten days before the trial, unless the court adjusts the deadline.[82] When the notice is filed, the court must appoint at least one psychiatrist or licensed psychologist to examine the defendant and testify at trial.[83] If the defendant fails to file the required notice of intent, s/he may not raise the issue of insanity or mental incompetence during the trial unless s/he can show good cause for his/her failure to file the notice.[84]

In cases in which the defendant claims that s/he was insane or otherwise mentally incompetent at the time of the crime, the jury must assess whether the defendant is "guilty," "not guilty," "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill," or "guilty but mentally retarded" (which is discussed above).[85] In order for the defendant to prove that s/he was insane at the time of the crime, the defendant must rebut the Georgia law presumption that all defendants are of sound mind and discretion[86] by establishing by a preponderance of the evidence that at the time of the alleged offense, s/he was insane, as defined above.[87] In contrast, in order for the defendant to prove that s/he was mentally ill at the time of the offense, s/he must establish his/her mental illness, as defined above, beyond a reasonable doubt and the state must prove that the defendant was guilty beyond a reasonable doubt.[88]

During the guilt/innocence phase, the state and defendant may present any evidence relevant to the defendant's mental condition, including the testimony of medical experts.[89] Following the presentation of evidence by the state and defendant, the court appointed psychiatrist or licensed psychologist will testify and be cross-examined by both

---

[81] GA. UNIF. SUPER. CT. R. 31.4.
[82] GA. UNIF. SUPER. CT. R. 31.1.
[83] O.C.G.A. § 17-7-130.1 (2004).
[84] GA. UNIF. SUPER. CT. R. 31.4(a).
[85] O.C.G.A. § 17-7-131(b)(1)(A)-(E) (2004).
[86] Boswell v. State, 572 S.E.2d 565, 567-68 (Ga. 2002); Moore v. State, 456 S.E.2d 708, 711 (Ga. Ct. App. 1995); Jackson v. State, 253 S.E.2d 874, 876-77 (Ga. Ct. App. 1977); GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 209.00 (3d ed. 2004). Regarding the issue of insanity at the time of the offense, the Georgia Suggested Pattern Jury Instructions state as follows: "Every person is presumed to be of sound mind and discretion, however, this presumption may be rebutted." *See* GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL II. (CRIMINAL CASES) § 209.00 (3d ed. 2004).
[87] Scoggins v. State, 275 S.E.2d 676, 677 (Ga. 1980) (discussing the applicable burden of proof); Boswell v. State, 256 S.E.2d 470 (Ga. 1979); *see also* GA. SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) §§ 209.10 (Insanity at Time of Act), 209.20 (Delusional Insanity) (3d ed. 2004).
[88] O.C.G.A. § 17-7-131(c)(2) (2004); Keener v. State, 334 S.E.2d 175, 178 (Ga. 1985).
[89] O.C.G.A. § 17-7-130.1 (2004).

the state and defendant.[90] Both parties may also introduce evidence in rebuttal to the testimony of the court-appointed medical witness.[91]

At the close of evidence, the court must inform the jury that it may consider the verdicts of "guilty," "not guilty," "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill at the time of the crime," and "guilty but mentally retarded."[92] In charging the jury on the available verdicts, the court must make clear that "if [the jury] find[s] [that] the defendant did not have the mental capacity to distinguish between right and wrong (or acted because of delusional compulsion), they must find the defendant not guilty by reason of insanity and must not find the defendant guilty but mentally ill."[93]

The court also must charge the jury as follows:

> I charge you that should you find the defendant not guilty by reason of insanity at the time of the crime, the defendant will be committed to a state mental heath facility until such time, if ever, that the court is satisfied that he or she be released pursuant to law.
>
> I charge you that should you find the defendant guilty but mentally ill at the time of the crime, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant.
>
> I charge you that should you find the defendant guilty but mentally retarded, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant.[94]

If the jury finds the defendant "not guilty by reason of insanity" (or the court previously accepted the defendant's plea of "not guilty by reason of insanity"), the court retains jurisdiction over the defendant and will order that s/he be detained in a state mental heath facility to evaluate the defendant's present mental condition.[95] The defendant's detention may not exceed thirty days from the date of the acquittal order.[96] Once the evaluation is complete, the mental health facility must send a report of the defendant's present mental

---

[90] *Id.*
[91] *Id.*
[92] O.C.G.A. § 17-7-131(c)(1) (2004).
[93] Keener, 334 S.E. 2d at 179.
[94] O.C.G.A. § 17-7-131(b)(3)(A)-(C) (2004).
[95] O.C.G.A. § 17-7-131(d) (2004)*; see also* O.C.G.A. § 17-12-87 (2005) (noting that when an indigent defendant is found to be "guilty by reason of insanity," the Office of Mental Health Advocate has the right to assume the defense and representation of such defense if the resources, funding, and staffing of the office allow; however, the attorney who represented the defendant at trial has the option to retain responsibility of the case).
[96] O.C.G.A. § 17-7-131(d) (2004).

condition to the court, the prosecuting attorney, and the defendant's attorney, if any.[97] Based on the evaluation, the court may discharge the defendant,[98] or hold a hearing to assess whether the defendant should be committed to the Department of Human Resources to receive involuntary treatment or other services,[99] or be subject to a period of conditional release under certain conditions set by the court.[100]

In contrast, if the jury finds the defendant "guilty but mentally ill," the court must sentence him/her in the same manner as a defendant found guilty of the offense.[101] In fact, a finding of "guilty but mentally ill" has the same force and effect of a plea or verdict of guilty, but it may allow certain defendants to obtain medical treatment.[102]

A defendant found to be "guilty but mentally ill" must be evaluated by a psychiatrist or a licensed psychologist from the Department of Human Resources.[103] Based on the examination, if the defendant is in need of hospitalization, the defendant must be transferred to the Department of Human Resources.[104] Alternatively, if the defendant is not in need of immediate hospitalization, the defendant must be committed to an appropriate penal facility where s/he must be further evaluated and treated.[105] The defendant may be transferred to the Department of Human Resources at any time if such action is "psychiatrically indicated for his[/her] mental illness."[106]

---

[97] *Id.*

[98] If the defendant does not meet the "inpatient commitment criteria," s/he must be discharged. *See* O.C.G.A. § 17-7-131(e)(1) (2004). An "inpatient" is defined as:

> A person who is mentally ill and:
>
> (A)(i) Who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or other persons; or
>
> (ii) Who is so unable to care for that person's own physical health and safety as to create an imminently life-endangering crisis; and
>
> (B) Who is in need of involuntary inpatient treatment.

O.C.G.A. § 37-3-1(9.1) (2004).

[99] To be committed to the Department of Human Resources, the defendant must meet the "inpatient commitment criteria." *See* O.C.G.A. § 17-7-131(e)(4) (2004)*; see also* O.C.G.A. § 17-7-131(e)(2) (2004) (requiring a hearing to assess whether the defendant meets the "inpatient commitment criteria").

[100] O.C.G.A. § 17-7-131(e)(5)(A) (2004).

[101] O.C.G.A. § 17-7-131(g)(1) (2004).

[102] Merrit v. State Farm Fire & Cas. Co., 463 S.E.2d 42 (Ga. Ct. App. 1995); United States v. Bankston, 121 F.3d 1411, 1416 (11th Cir. 1997).

[103] O.C.G.A. § 17-7-131(g)(1) (2004).

[104] O.C.G.A. § 17-7-131(g)(4) (2004).

[105] O.C.G.A. § 17-7-131(g)(2) (2004).

[106] O.C.G.A. § 17-7-131(g)(3) (2004).

If the defendant is found "guilty" rather than "not guilty by reason of insanity" or "guilty but mentally ill," s/he may present evidence of his/her mental condition as mitigation during the sentencing phase of the capital trial.

C. Resources Provided to the Mentally Retarded and Mentally Disabled

With the passage of the Georgia Indigent Defense Act of 2003 (the Act),[107] the Office of the Georgia Capital Defender (GCD), which is responsible for representing indigent defendants charged with capital offenses for which the death penalty is being sought, is authorized to hire "as many assistant attorneys, clerks, investigators, paraprofessionals, administrative assistants, and other persons as may be necessary" to carry out his/her responsibilities as the Capital Defender.[108] As of early December 2005, the GCD had on staff ten investigators and one forensic social worker.[109] The Capital Defender also has a budget to hire any necessary experts without approaching the court for approval.

Similarly, in cases in which the GCD is unable to represent the defendant due to a conflict of interest, the appointed conflict attorney does not have to apply to the court for experts or investigators.[110] Rather, the conflict attorney must submit a form entitled "Request for Pre-Approval for an Expert Witness" to the Deputy Director for Conflict Case Management at the Georgia Public Defender Standards Council.[111] The form must include the total amount that the expert or investigator is requesting to perform the service(s); it should not include an hourly fee to be computed at a later date, or a variable fee based upon some future event.[112] If the total cost is unknown, the form should include an amount that will cover the expert's anticipated initial service(s), as the attorney may submit supplemental requests for additional services.[113] Requests for fees associated with the expert testimony should be handled in a supplemental request once the need for the testimony arises.[114] The pre-approval procedure must be followed in order for the experts and investigators to obtain payment for their services.[115]

D. "Next Friend"[116] Petitions On Behalf of the Incompetent

---

[107] *See supra* ch. 6, discussing Georgia's current defense services system.
[108] O.C.G.A. § 17-12-126(a) (2005).
[109] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).
[110] Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_experts.pdf (last visited on Aug. 23, 2005).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] A "next friend" is an individual acting for benefit of a *person sui juris*, without being regularly appointed guardian. A "next friend" is not a party to an action, but is an officer of the court, especially appearing to look after the interests of the person for whose benefit s/he appears. Where permitted, in a capital case, this includes acting to assert claims for a defendant who seeks to waive such claims.

A "next friend" has standing to file a petition on behalf of a death-row inmate who wishes to waive his/her right to pursue post-conviction proceedings if the "next friend" can establish that s/he is truly acting in the best interests of the inmate[117] and that the inmate is incompetent within the definition articulated by the United States Supreme Court in *Rees v. Payton*.[118]

Pursuant to *Rees*, an individual is incompetent if s/he lacks the "capacity to appreciate his[/her] position and make a rational choice with respect to continuing or abandoning further litigation" or suffers "from a mental disease, disorder, or defect which may substantially affect his[/her] capacity in the premises."[119] The standard articulated in *Rees* involves a determination of three issues: (1) whether the individual suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents that individual from understanding his/her legal position and the options available to him/her; and (3) whether a mental disease, disorder, or defect prevents that individual from making a rational choice among his/her options.[120] Rational reasons for choosing not to pursue post-conviction proceedings include: "[the inmate] was tired of languishing in prison; [the inmate] was pessimistic [s/he] would ever get out of prison; and [the inmate] truly believed [s/he] would be happier in the afterlife."[121]

E. Competency to be Executed[122]

An inmate who is sentenced to death but found to be "mentally incompetent to be executed" may not be executed.[123] An inmate is mentally incompetent to be executed if "because of a mental condition [s/he] is presently unable to know why [s/he] is being punished and understand the nature of the punishment."[124]

An inmate who believes that s/he may be "mentally incompetent to be executed" may challenge his/her mental competency by filing an application with the superior court of the county in which s/he is detained.[125] However, the application cannot be filed until the completion of the direct appeal and until the superior court judge has signed the order

---

[117] Lonchar v. Zant, 978 F.2d 637, 641 (11th Cir. 1993) (citing Whitmore v. Arkansas, 495 U.S 149 (1990)).
[118] Kellogg v. Zant, 390 S.E.2d 839, 840-41 (Ga. 1990) (citing Rees v. Peyton, 384 U.S. 312, 314 (1966)).
[119] *Rees*, 384 U.S. at 314.
[120] *Lonchar*, 978 F.2d at 641-42; Hauser v. Moore, 223 F.3d 1316, 1322 (11th Cir. 2000) (citing *Lonchar*, 978 F.2d at 641-42).
[121] *Hauser*, 223 F.3d at 1323.
[122] In 1986, the United States Supreme Court, in *Ford v. Wainwright*, found that procedures for assessing an inmate's mental competency are in violation of the Eighth Amendment of the United States Constitution if the procedures do the following: (1) fail to include the inmate in the "truth-seeking process;" (2) deny the inmate the opportunity to challenge or impeach the state-appointed psychiatrists' opinions; and (3) place the decision on the inmate's mental capacity wholly within the executive branch. *See* Ford v. Wainwright, 477 U.S. 399, 413-16 (1986).
[123] O.C.G.A. § 17-10-61 (2004).
[124] O.C.G.A. § 17-10-60 (2004).
[125] O.C.G.A. § 17-10-63(a) (2004).

setting a period of time within which the execution should take place.[126] By filing the application, the inmate consents to submit to a state examination to assess his/her mental competency to be executed.[127]

The inmate's application must identify the following:

1. The proceeding in which the applicant was convicted;
2. The date of the rendition and the final judgment;
3. Whether a time period for execution has been set;
4. The date of the signing of the order and the dates of the designated time period for the execution;
5. Any previous proceedings that the inmate may have taken to challenge his/her mental competency to be executed or his/her mental condition at the time of the crime and/or trial; and
6. All facts in support of the assertion that the inmate is presently mentally incompetent.[128]

All arguments and citations must be excluded from the application, but all relevant evidence in support of the inmate's assertions, including affidavits and records, must be attached to the application.[129] The application must also be verified with the oath of the inmate or someone else on his/her behalf.[130]

In addition to the application, the inmate may file a request for the appointment of a specific expert to assess his/her mental competency to be executed.[131] If the court finds that the inmate makes a sufficient showing that his/her mental competency may be a "significant issue," it may appoint an expert to conduct an examination of the inmate.[132]

Following the filing of the application, the respondent must answer the application and the court must schedule a hearing "as soon as possible."[133] At the hearing, both parties may introduce witnesses and other evidence on the issue of the inmate's mental competency to be executed.[134] After reviewing the evidence, the court must make written findings of fact and conclusions of law upon which its judgment is based.[135]

---

[126] O.C.G.A. § 17-10-67 (2004).
[127] O.C.G.A. § 17-10-66(a) (2004).
[128] O.C.G.A. § 17-10-63(b) (2004).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] O.C.G.A. § 17-10-66(c) (2004).
[133] O.C.G.A. § 17-10-65 (2004).
[134] O.C.G.A. § 17-10-68(a) (2004).
[135] O.C.G.A. § 17-10-68(d) (2004).

If the court finds that the inmate has proven his/her mental incompetency to be executed by a preponderance of the evidence, it must enter an order to that effect.[136] The inmate's execution then is stayed for the duration of the inmate's incompetency.[137] If and when the inmate regains competency, the court that made the original finding as to incompetency must be notified of the inmate's condition.[138] The court must enter an order noting the change in the inmate's condition and vacate the inmate's stay of execution.[139] A copy of the order must be sent to the sentencing court, at which time it must fix a new time period during which the inmate's sentence must be carried out.[140]

In contrast, if the court denies the inmate's application, it must telephonically notify the parties of the judgment and dissolve any relevant stays of execution.[141]

The state may appeal the court's finding of mental incompetency in any and all cases.[142] But, in order for the inmate to appeal a finding of competency, s/he must obtain a certificate of probable cause for the appeal from the Georgia Supreme Court.[143] A written application for the certificate of probable cause for appeal must be filed with the clerk of the Georgia Supreme Court within three days of the order denying the inmate's application.[144] Within the same period of time, the inmate also must file a notice of appeal with the clerk of the superior court in which the inmate is detained.[145] The Georgia Supreme Court must make a decision as to the inmate's application "within a reasonable time after filing."[146] If the Court denies the inmate's application, the Court must inform the applicable superior court that the inmate lacks probable cause to appeal.[147]

---

[136] O.C.G.A. § 17-10-68(e) (2004).
[137] O.C.G.A. § 17-10-71 (2004).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] O.C.G.A. § 17-10-68(e) (2004).
[142] O.C.G.A. § 17-10-70(c) (2004).
[143] O.C.G.A. § 17-10-70(a), (b) (2004).
[144] O.C.G.A. § 17-10-70(b) (2004).
[145] *Id.*
[146] *Id.*
[147] *Id.*

II. ANALYSIS

A. *Recommendation #1*

> **Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime**.

The American Association on Mental Retardation (AAMR) defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18."[148]

Since 1989, the State of Georgia has prohibited the execution of all mentally retarded offenders.[149] The Georgia Code defines mental retardation as: (1) "significant[] subaverage general intellectual functioning," (2) "resulting in or associated with impairments in adaptive behavior," which (3) "manifested during the developmental period." Georgia's definition of mental retardation is similar to the AAMR definition.

Under the AAMR definition, limited intellectual functioning requires that an individual have an impairment in general intellectual functioning that places him/her in the lowest category of the general population. IQ scores alone are not precise enough to identify the upper boundary of mental retardation. Experts generally agree that mental retardation includes everyone with an IQ score of 70 or below, but the definition also includes some individuals with IQ scores in the low to mid-70s.[150] Thus, no state should impose an IQ

---

[148] American Association on Mental Retardation, AAMR Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on Aug. 23, 2005).

[149] *See supra* notes 1-7 and accompanying text.

[150] See James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at 7 (2002) (unpublished manuscript), *available at* www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited on Aug. 23, 2005). Ellis notes that "relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation." *Id.* at 7 n.18; *see also* American Association of Mental Retardation, Definition of Mental Retardation, *at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited on Aug. 23, 2005) (noting that "an obtained IQ score must always be considered in light of its standard error of measurement," thus making the IQ ceiling for mental retardation rise to 75. However, "an IQ score is only one aspect in determining if a person has mental retardation."); AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (Ruth Luckasson ed., 9th ed. 1992) ("Mental retardation is characterized by significantly subaverage intellectual capabilities or 'low intelligence.' If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the

maximum lower than 75. Clinical judgments by experienced diagnosticians are necessary to ensure accurate diagnoses of mental retardation.[151]

The Georgia Code's definition of mental retardation is similar to the AAMR definition in that it does not set an IQ maximum for mental retardation. The Georgia Supreme Court, however, has recognized the IQ range of "70 or below" as being "an indication of significantly subaverage intellectual functioning."[152] The Georgia Supreme Court has not addressed the issue of whether an IQ score in the low to mid-70s disqualifies a defendant or death-row inmate from being found to have mental retardation, and Georgia trials courts, in at least some mental retardation cases, have interpreted the statute to permit the jury to consider IQ scores as high as 75 as possibly being supportive of a mental retardation verdict, in view of the possibility of a 5 point margin of error.

The State of Georgia also requires the defendant or death-row inmate to have significant impairments in adaptive behavior. The AAMR definition of mental retardation includes adaptive behavior limitations, which produce real-world disabling effects on a person's life, designed to ensure that an individual is truly disabled and not simply a poor test-taker.[153] Under this definition, adaptive behavior is "expressed in conceptual, social, and practical adaptive skills" and focuses on broad categories of adaptive impairment, not service-related skill areas.[154] The United States Supreme Court in *Atkins v. Virginia* indicated that a limitation in adaptive behavior was comprised of deficits in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.[155]

---

statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner."); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) ("This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment."); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) ("Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.").

[151] This fact is reflected in *Atkins v. Virginia*, where the Court noted that "an IQ between 70 and 75" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U.S. 304, 309 n.5 (2002).

[152] *See, e.g.*, Perkinson v. State, 610 S.E.2d 533, 537-38 (Ga. 2005); Head v. Ferrell, 554 S.E.2d 155 (Ga. 2001); Stripling v. State, 401 S.E.2d 500, 504 (Ga. 1991); *State Board Won't Grant Clemency, Former Fort Benning Soldier Scheduled to Be Executed Today for Conviction in "Forces of Evil" Murder 16 Years Ago*, COLUMBUS LEDGER-ENQUIRER, Mar. 31, 1994 (noting that "[a] Superior Court judge rejected [Hance's] claim [of mental retardation] Monday, saying Hance's IQ of 75-79 doesn't meet the state's definition of mental retardation").

[153] Ellis, *supra* note 150, at 8.

[154] *Id.*

[155] 536 U.S. at 309 n.3.

Georgia courts have not explicitly defined the term "adaptive behavior," but when assessing impairments in a defendant's adaptive behavior, the Georgia Supreme Court has considered some of the same skill areas mentioned in *Atkins*, including: functional academics, employment history, vocational training, and social skills.[156] The State of Georgia requires these impairments in adaptive behavior to manifest during the "developmental period."

The AAMR requires that mental retardation be manifested during the developmental period, which is generally defined as up until the age of 18. This does not mean that a person must have been IQ tested with scores in the mentally retarded range during the developmental period, but instead, there must have been manifestations of mental disability, which at an early age generally take the form of problems in the area of adaptive functioning.[157] The age of onset requirement is used to distinguish mental retardation from those forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.[158]

Similar to the AAMR definition, the Georgia Supreme Court has defined the "developmental period" as being under the age of 18.[159]

Based on this information, the State of Georgia is only in partial compliance with Recommendation #1.

B. Recommendation #2

> **All actors in the criminal justice system, including police, court officers, prosecutors, defense attorneys, prosecutors, judges, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.**

Apart from law enforcement officials, the State of Georgia does not explicitly require any other actors in the criminal justice system to participate in training to recognize mental retardation in capital defendants and death-row inmates. All Georgia "peace officers"[160] are statutorily required to meet certain criteria[161] and complete a basic course[162] at a

---

[156] Head v. Stripling, 590 S.E.2d 122, 124 (Ga. 2003).
[157] Ellis, *supra* note 150.
[158] *Id.*
[159] *Stripling*, 590 S.E.2d at 124 n.1.
[160] A "peace officer" is defined, for the purposes of this Section, as "an agent, operative, or officer of this state, a subdivision or municipality thereof, . . . who, as an employee for hire or as a volunteer, is vested either expressly by law or by virtue of public employment or service with authority to enforce the criminal or traffic laws through the power of arrest and whose duties include the preservation of public order, the protection of life and property, and the prevention, detection, or investigation of crime." *See* O.C.G.A. § 35-8-2(8)(A) (2005).
[161] O.C.G.A. § 35-8-8(a) (2005). One must (1) be at least 18 years of age; (2) be a citizen of the United States; (3) have obtained a high school diploma or the recognized equivalent; (4) not have been convicted of any state or federal felonies or sufficient misdemeanors to establish a pattern of disregard for the law; (5)

Georgia Peace Officer Standards and Training Council (POST) certified academy.[163] The mandatory basic course consists of 404 hours of training, including such relevant areas as "mental health, mental retardation, and substance abuse."[164] This six hours of instruction on "mental health, mental retardation, and substance abuse" includes, but is not limited to, instruction for law enforcement candidates on (1) the statutory guidance on mental retardation; (2) the proper definition of mental retardation and IQ metric for determining the level of mental retardation according to DSM (Diagnostic and Statistical Manual of Mental Disorders) IV; (3) characteristic signals to look for to identify a mentally retarded person; (4) proper methods of communicating with persons whom they suspect are mentally retarded, including additional requirements for interrogations to ensure voluntariness of any statements made during that interrogation; and (5) appropriate methods for dealing with mentally retarded persons who become violent, including steps to take to avoid the use of force.[165]

Additionally, the Georgia Department of Community Affairs has developed a Model Law Enforcement Operations Manual (MLEOM), which contains "professional standards and requirements for law enforcement operations,"[166] including standards on "signs to help in the recognition of mental illness in a person."[167] The Georgia Department of Community Affairs suggests that the MLEOM be used by law enforcement agencies to assist with developing or revising polices and procedures.[168] The Georgia Association of Chiefs of Police has adopted a similar version of the MLEOM as its "Sample Law Enforcement

---

be fingerprinted for a background check; (6) possess good moral character; (7) complete an oral interview; (8) be found free from an adverse physical, emotional, or mental condition; and (9) successfully complete the basic training course entrance examination. *Id.*; *see also* GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL R. 464-3-.02(a) (2005), *available at* http://www.gapost.org/5Trng.htm (last visited on Oct. 4, 2005).

[162] O.C.G.A. § 35-8-9(a) (2005); GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL R. 464-3-.03(a) (2005), *available at* http://www.gapost.org/5Trng.htm (last visited on Oct. 4, 2005).

[163] O.C.G.A. § 35-8-11 (2005).

[164] GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, 404 HOUR BASIC LAW ENFORCEMENT TRAINING COURSE (11th ed. 2003) (table of contents), *available at* http://www.gapost.org/pdf_file/bletc404.pdf (last visited on Oct. 4, 2005) (The curriculum for this training course, as produced by the POST Council, is the minimum level of instruction and training for law enforcement officials required to be taught at POST-certified training academies.).

[165] GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, 404 HOUR BASIC LAW ENFORCEMENT TRAINING COURSE 3.3-1 to -9, 4.5-17 (11th ed. 2003) [hereinafter POST BASIC TRAINING COURSE].

[166] GA. DEP'T OF CMTY. AFFAIRS, MODEL LAW ENFORCEMENT OPERATIONS MANUAL (acknowledgement), *at* http://www.dca.state.ga.us/development/research/programs/downloads/law/ackn.html (last visited on Oct. 4, 2005).

[167] GA. DEP'T OF CMTY., MODEL LAW ENFORCEMENT OPERATIONS MANUAL 16-6 (6th ed. 1996) [hereinafter MLEOM], *available at* http://www.dca.state.ga.us/development/research/programs/downloads/law/Law.html (last visited on Oct. 4, 2005).

[168] *Id.*

Operations Manual" (SLEOM).[169] The extent to which Georgia law enforcement agencies have adopted either the MLEOM or the SLEOM is unknown.

Both the Unified Appeal Proceedings Rules and the "GPDSC [the Georgia Public Defender Standards Council] Death Penalty Defense Standards" also contain relevant training requirements for attorneys. The Unified Appeal Proceedings Rule IIA requires all trial and appellate counsel handling death penalty cases to receive at least ten hours of specialized death penalty training.[170] Attorneys must fulfill this requirement by taking training related to "death penalty defense," which could include, but is not required to include, training on mental retardation.[171] The "GPDSC Death Penalty Defense Standards," which were adopted by the GPDSC in April 2005 and are pending ratification by the General Assembly in order to become effective,[172] also requires that at least one member of the defense team (one of the attorneys or the investigator or mitigation specialist) be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments, but this requirement can be fulfilled without the defense attorney participating in any training on mental retardation.[173]

Even though the State of Georgia does not explicitly require attorneys to take training on mental retardation, training on this issue is available to prosecutors and defense attorneys at the Office of the Georgia Capital Defender (GCD) and conflict attorneys who handle death penalty cases. The Prosecuting Attorney's Council of Georgia (PAC) offers prosecutors continuing legal education programs on the death penalty that occasionally address mental retardation, but none of the programs specifically train prosecutors to recognize mental retardation.

All GCD attorneys receive training on mental retardation, and the GCD also offers two major death penalty seminars each year, both of which emphasize issues surrounding

---

[169] *See* GA. ASS'N OF CHIEFS OF POLICE, SAMPLE LAW ENFORCEMENT OPERATIONS MANUAL, *available at* http://www.gachiefs.com/Sample%20LE%20Manual/SCHAPTER17.doc (last visited on Oct. 4, 2005).

[170] GA. UNIFIED APPEAL R. II(A)(1)-(2).

[171] *Id.*

[172] Standards adopted by the GPDSC that are determined by the General Oversight Committee to have a "fiscal impact" are not effective until ratified by joint resolution of the General Assembly and upon approval of the resolution by the Governor or upon its becoming law without his/her approval. *See* O.C.G.A. 17-12-8(c) (2005); s*ee also* Fax from Chris Adams, Georgia Public Defender (Dec. 2, 2005) (on file with the author); Georgia Public Defender Standards Council, 2005 Legislative Session Report #8, *at* http://www.gpdsc.com/resources-legislation-update_04-05-05.htm (last visited on Oct. 5, 2005) (noting the General Oversight Committee "determined that all of the standards adopted [as of March 23, 2005] by the [GPDSC] have a fiscal impact").

[173] GA. PUB. DEFENDER STANDARDS COUNCIL, DEATH PENALTY DEFENSE STANDARDS, *at* http://www.gidc.com/cpdsystem-standards-death_penalty_case.pdf (last visited on Oct. 7, 2005).

mental retardation.[174] Attendance at the seminars is by invitation only and priority is given to attorneys with active death penalty cases in Georgia.[175]

The Office of Mental Health Advocate (OMHA) also offers programs to interested defense attorneys on mental retardation.[176] The last OMHA seminar, offered in May 2005, was entitled "Defense Strategies for Evaluating, Placing, and Treating the Mentally Ill Client," and a portion of the seminar focused on distinguishing mental illness from mental retardation.[177] All of the OMHA seminars are elective and the frequency of seminars focusing on recognizing mental retardation is unknown.

To the best of our knowledge, there are no equivalent programs available to court officers, judges, or prison authorities.

Based on this information, it appears that law enforcement officials are receiving mandatory training on how to recognize mental retardation and interact with mentally retarded suspects and witnesses, but not all actors within the criminal justice system are required to receive this training. Therefore, the State of Georgia is only in partial compliance with Recommendation #2.

C. Recommendation #3

> **The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.**

As discussed under Recommendation # 2, the State of Georgia does not require attorneys representing capital defendants with mental retardation to participate in any special training on recognizing mental retardation and understanding the impact of mental

---

[174] *See, e.g.*, Georgia Capital Defender, 13th Annual Capital Defense Training Seminar, "The Nitty-Gritty of Capital Defense," Agenda (Feb. 4-6, 2005) (on file with author).

[175] Georgia Capital Defender, Training, at http://www.gacapdef.org/main.htm (last visited on Aug. 30, 2005).

[176] *See* OHMA Mental Health Seminar, Georgia Public Defender Standards Council, Mental Health Advocate, OHMA Mental Health Seminar, Agenda, *at* http://www.gpdsc.com/omha-resources-seminars.htm (last visited on Aug. 23, 2005).

[177] *Id.*

retardation, but training on mental retardation is available to GCD attorneys and conflict attorneys who handle death penalty cases.

Additionally, the GCD is authorized to hire "as many assistant attorneys, clerks, investigators, paraprofessionals, administrative assistants, and other persons as may be necessary" to carry out his/her responsibilities as the Capital Defender.[178] As of early December 2005, the GCD had on staff ten investigators and one forensic social worker.[179] The Capital Defender also has a budget to hire any necessary experts, including mental health experts, without approaching the court for approval.

Similarly, in cases in which the GCD is unable to represent the defendant due to a conflict of interest, the appointed conflict attorney does not have to apply to the court for experts or investigators.[180] Rather, the conflict attorney must submit a form entitled "Request for Pre-Approval for an Expert Witness"[181] to the Deputy Director for Conflict Case Management at the Georgia Public Defender Standards Council.[182] The costs associated with hiring these experts also come from the state funds appropriated to the GPDSC for use by the GCD, and the GCD planned for and set aside money for experts for each expected case requiring conflict counsel.[183]

The budget for the GCD, however, was based on a projected forty death penalty cases and an additional nine conflict death penalty cases per year.[184] As of early December 2005, forty-seven capital prosecutions—thirty-five handled by GCD and twelve handled by a conflict defender—had commenced.[185] Thus, it remains to be seen whether there will be enough money in the GCD budget to allow GCD attorneys and conflict attorneys to hire all necessary experts.

Based on this information, it is unclear whether the State of Georgia is in compliance with Recommendation #3.

---

[178] O.C.G.A. § 17-12-126(a) (2005).

[179] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

[180] Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_experts.pdf (last visited on Aug. 23, 2005).

[181] The Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005 refers to the "Request for Pre-Approval for an Expert Witness," but we were unable to locate a form by that name. However, the GPDSC website contains a similar form entitled "Requisition for Employment of Expert Witness," which appears as if it can be used in death penalty cases.

[182] Protocol for the Appointment of Expert Witnesses and Investigators in Death Penalty Cases assigned to Private Counsel after January 1, 2005, *at* http://www.gidc.com/cpdsystem-forms-conflict-dp_protocol_experts.pdf (last visited on Aug. 23, 2005).

[183] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

[184] Georgia Public Defender Standards Council, Meeting Minutes (Aug. 22, 2003), *at* http://www.gpdsc.com/aboutus-council-minutes-minutes_08-22-03%20.pdf (last visited on Aug. 24, 2005).

[185] Fax from Chris Adams, Georgia Capital Defender (Dec. 2, 2005) (on file with the author).

D. Recommendation #4

> **For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia*[186] or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.**

In all death penalty trials where the capital trial's guilt/innocence phase took place on or after July 1, 1988 (the date Georgia adopted a law banning the execution of certain mentally retarded offenders), the timing of a mental retardation determination largely depends upon at which point in the proceedings the defendant raises the issue of mental retardation.

The defendant may raise the issue of mental retardation and obtain a determination of the issue at three points during the proceedings: (1) pretrial, (2) guilt/innocence phase, and (3) post-conviction.[187] The determination of mental retardation, however, generally occurs during the guilt/innocence phase of the capital trial.[188] In fact, a determination of mental retardation is made outside of the guilt/innocence phase only if the defendant pleads "guilty but mentally retarded" and the judge accepts the defendant's plea, or if the defendant failed to raise the issue during the guilt/innocence phase, s/he may raise the issue by petitioning for a writ of habeas corpus under the "miscarriage of justice" prong of the habeas corpus statute.[189]

The State of Georgia, therefore, is only in partial compliance with Recommendation #4. Although the State of Georgia does not require that determinations of mental retardation be made prior to the guilt/innocence phase of a capital trial, it does require that these determinations be made before the sentencing phase. It also grants defendants who failed to raise the issue of mental retardation at trial another opportunity to raise the issue by filing a writ of habeas corpus.

E. Recommendation #5

> **The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.**

The State of Georgia does not require the prosecution to disprove mental retardation after the defendant has presented a substantial showing that s/he may have mental retardation.

---

[186] 536 U.S. 304 (2002).
[187] *See supra* notes 14-44 and accompanying text.
[188] *Id.*
[189] *Id.*

Rather, Georgia places the burden of proving mental retardation on the defendant. The requisite burden of proof varies depending upon two factors: (1) when the guilt/innocence phase of the defendant's capital trial takes place; and (2) when the defendant raises the issue of mental retardation.

In all death penalty cases where the guilt/innocence phase took place or takes place after July 1, 1988, the defendant may raise the issue of mental retardation and obtain a determination of mental retardation at three points during the proceedings: (1) pretrial, (2) guilt/innocence phase; or (3) post-conviction.[190] A defendant who pleads "guilty but mentally retarded" has the burden of establishing that there is "sufficient factual basis" to find that s/he has mental retardation in order for the judge to accept his/her plea of "guilty but mentally retarded."[191] In contrast, when a claim of mental retardation is raised during the guilt/innocence phase or post-conviction, the defendant has the burden of proving mental retardation "beyond a reasonable doubt."[192]

In all death penalty cases where the guilt/innocence phase took place before July 1, 1988, the inmate may raise the issue of mental retardation only once by filing a petition for a writ of habeas corpus.[193] The defendant has the initial burden of presenting through his/her petition and supporting evidence and any evidence presented at the hearing on the petition, if held, "sufficient credible evidence" to create a "genuine issue regarding [mental] retardation."[194] If the court finds a genuine issue of fact, it may grant the writ for the limited purpose of conducting a *Fleming* trial on the issue of mental retardation.[195] At the *Fleming* trial, the defendant has the burden of establishing his/her mental retardation by a "preponderance of the evidence."[196]

The State of Georgia, therefore, only is in partial compliance with Recommendation #5. The State of Georgia does not place the burden of disproving mental retardation on the prosecution, but instead places the burden of proof on the defendant. Additionally, the burden of proof is not limited to a preponderance of the evidence, except in cases in which the capital trial's guilt/innocence phase took place before July 1, 1988, and the inmate filed a petition for a writ of habeas corpus based on his/her mental retardation. In all other cases, the defendant must establish mental retardation beyond a reasonable doubt, except perhaps if the judge accepts a pre-trial plea.

F. Recommendation #6

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are

---

190 *Id.*
191 *Id.*
192 *Id.*
193 *See supra* notes 45-61 and accompanying text.
194 *Id.*
195 *Id.*
196 *Id.*

sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The State of Georgia does not have any laws, rules, procedures, standards, or guidelines explicitly requiring that special steps be taken to ensure that the *Miranda* rights of mentally retarded offenders are sufficiently protected or that false, coerced, or garbled confessions are not obtained or used.

However, police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Georgia certified by the Commission on Accreditation for Law Enforcement Agencies (CALEA)[197] and/or the Georgia Law Enforcement Certification Program (GLECP)[198] are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on interviews and interrogations.[199] CALEA further requires a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations and access to counsel[200] and the GLECP requires a written directive addressing confessions and admissions.[201] Additionally, both the Georgia Department of Community Affairs' Model Law Enforcement Operations Manual

---

[197] Forty-two police departments, sheriff's departments, state law enforcement agencies, transportation police departments, and university police departments in Georgia have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). *See* CALEA Online, Agency Search, *at* http://www.calea.org/agcysearch/agencysearch.cfm (last visited on Sept. 23, 2005) (use second search function, designating "U.S." and "Georgia" as search criteria); *see also* CALEA Online, About CALEA, *at* http://www.calea.org/newweb/AboutUs/Aboutus.htm (last visited on Sept. 23, 2005) (noting that CALEA is an independent accrediting authority established by the four major law enforcement membership associations in the United States: the International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) completing a thorough self-assessment to determine whether the law enforcement agency complies with the accreditation standards and developing a plan to come into compliance; (5) an on-site assessment by a team selected by the Commission to determine compliance who will submit a compliance report to the Commission; and (6) a final decision on accreditation based on the on-site assessment report. *See* CALEA Online, Accreditation Process, *at* http://www.calea.org/newweb/accreditation%20Info/process1.htm (last visited on Sept. 23, 2005).

[198] Ninety police, sheriff's, state law enforcement, transportation police, and university police departments have obtained certification under the GLECP. GEORGIA LAW ENFORCEMENT CERTIFICATION PROGRAM: STANDARDS MANUAL, at intro. (3d ed. 2002) [hereinafter GLECP STANDARDS] (noting that the Georgia Law Enforcement Certification Program was established in 1997 as a stepping-stone to national accreditation under CALEA's Standards for Law Enforcement Agencies); Georgia Association of Chiefs of Police, State Certified Agencies, *at* http://www.gachiefs.com/statecertification/StateCertifiedAgencies.html (last visited on Sept. 23, 2005).

[199] COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1); GLECP STANDARDS, *supra* note 198, at 4 (Standard 5.23).

[200] CALEA STANDARDS, *supra* note 199, at 1-3 (Standard 1.2.3).

[201] GLECP STANDARDS, *supra* note 198, at 18 (Standard 4.2).

(MLEOM) and the Georgia Association of Chiefs of Police's Sample Law Enforcement Operations Manual (SLEOM) contain standards on *Miranda* rights and the voluntariness and admissibility of confessions.[202] It appears, however, that the CALEA, GLECP, MLEOM and the SLEOM standards do not require special procedures for interrogating or taking the confession of a mentally retarded person. Similarly, the required basic course for peace officers includes training on interviews and interrogations,[203] but it is unclear the extent to which the peace officers' basic course covers *Miranda* rights and the taking of confessions of mentally retarded persons.

Based on this information, the State of Georgia fails to meet the requirements of Recommendation #6.

G. Recommendation # 7

> **The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.**

Courts can protect against "waivers" of rights, such as the right to counsel, by holding a hearing (either *sua sponte* or upon the request of one of the parties) to determine whether the defendant's mental disability affects his/her ability to make a knowing and voluntary waiver and by rejecting any waivers that are the product of the defendant's mental disability. It does not appear as if the State of Georgia requires courts to conduct hearings to determine whether the defendant's mental disability affects his/her ability to make a knowing and voluntary waiver, especially in cases in which the court previously held a hearing to determine the defendant's competency to stand trial. In *Colwell v. State*,[204] the Georgia Supreme Court held that trial courts are not required to conduct a further hearing on a defendant's competence and on the knowing and voluntary nature of his decision about his representation when "[the defendant] had just been found competent after a lengthy competency trial, and trial court carefully explained [the defendant]'s rights to him and made repeated and thorough inquiries of him concerning decisions about representation and whether those decisions were freely made."[205]

The State of Georgia, however, does seem to limit which rights can be waived and expects trial courts to take certain measures when certain rights have been waived. For example, the Georgia Supreme Court prohibits inmates who were tried before July 1, 1998 and who create a genuine issue regarding his/her mental retardation in their *habeas*

---

[202] MLEOM, *supra* note 167.

[203] GA. PEACE OFFICER STANDARDS & TRAINING COUNCIL, 404 HOUR BASIC LAW ENFORCEMENT TRAINING COURSE (11th ed. 2003) (table of contents), *available at* http://www.gapost.org/pdf_file/bletc404.pdf (last visited on Oct. 4, 2005).

[204] 544 S.E.2d 120 (Ga. 2001).

[205] *Id.* at 126.

petition from waiving their *Fleming* trial, which is where they receive a jury determination on the issue of mental retardation.[206]

Based on this information, it does not appear that the State of Georgia is in compliance with Recommendation #7.

---

[206] Rogers v. State, 575 S.E.2d 879, 881-82 (Ga. 2003).

APPENDIX

Race and Death Sentencing in Georgia
1989-1998

Glenn Pierce
Michael L. Radelet
Raymond Paternoster

January 12, 2006

B

Race and Death Sentencing in Georgia
1989-1998

Concerns about the possibility of racial bias in death sentencing in the United States have been voiced for several decades. In the 1972 decision in *Furman v. Georgia*, which (in effect) struck down all existing death penalty statutes in the U.S., Justice Marshall in particular rested his concurring decision in large part on concerns that capital punishment was discriminatorily applied against black defendants.[1] Since 1972 there have been several research studies that have continued to examine the possible effects of defendant's or victim's race on death sentencing decisions.[2] In this report, we focus our attention to the State of Georgia to see if contemporary death sentencing decisions are correlated with the racial characteristics of defendants and/or victims.

American death sentencing patterns today are even more strongly correlated with race than they were before the *Furman* decision. Between 1930 and 1976 there were 3,859 executions in the U.S., 54.6 percent of which claimed the lives of black offenders. Among executions for homicides, 1,664 (49.9 percent) were of white offenders and 1,670 (50.1 percent) were of black offenders.[3] Today we measure offender's race and ethnicity more precisely, breaking down minority groups into black, Hispanic, Native American and Asian categories. Among those on death row as of October 1, 2005, 1,532 (45.3

---

[1] Furman v. Georgia, 408 U.S. 238, 374-66 (1972).
[2] *See* U.S. GEN. ACCT. OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, GAO/GGD.90-57, at 5 (1990).
[3] U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT, 1976 NATIONAL PRISONER STATISTICS BULLETIN, SD-NPS-CP-5, at 13 (1977).

percent) were white and 1,850 (54.7 percent) were nonwhite.[4] Therefore, if we compare those executed for homicide between 1930 and 1967 and those on death row today, the nonwhite proportion has actually increased from 50.1 percent to 54.7 percent. This does not prove racial bias, but certainly raises flags and questions.

This report focuses on Georgia, the jurisdiction where more research on race and death sentencing has been conducted over the past three decades than in any other state. In the following pages we will first review studies that have examined race and death sentencing in Georgia, and then describe a relatively modest study that we conducted to ascertain if the race of homicide defendants and victims is correlated with contemporary death penalty decisions in Georgia.

Previous Research

One of the most sophisticated studies of the effects of race on death sentencing before the *Furman* decision was conducted in Georgia. That study focused on executions for rape. Marvin Wolfgang and Mark Riedel examined 361 rape cases from Georgia, 1945-1965, and found that blacks convicted of raping white victims were disproportionately sentenced to death.[5] This difference remained after controlling for possible aggravating factors, such as a contemporaneous felony offense, use of a weapon, or the offender's prior record of criminal convictions. In fact, Wolfgang and Riedel

---

[4] NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. 3 (2005), *at* http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Fall_2005.pdf (last visited on Jan. 4, 2006).

[5] Marvin E. Wolfgang & Marc Riedel, *Rape, Racial Discrimination, and the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES (Hugo Adam Bedau & Chester Pierce eds. 1976); *see also* Marvin E. Wolfgang & Marc Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. OF ORTHOPSYCHIATRY 658 (1975).

concluded that race was the single most important factor in predicting death penalty decisions for rape.[6]

After *Furman*, the first empirical study of death sentencing in Georgia focused on the consistency of appellate decisions. In that study, Professor George Dix looked at how appellate courts in Georgia, Florida and Texas ensured consistency in death sentencing.[7] Dix criticized the Georgia Supreme Court for focusing too much on statutory aggravating factors and not enough on mitigating factors, and for missing several opportunities to help trial courts reach more consistent decisions.[8] This conclusion was echoed in research conducted by Ursula Bentele, who studied decisions made by the Georgia Supreme Court in 1981.[9] She concluded that the new (post-*Furman*) law in Georgia "has failed to bring about fair and evenhanded imposition of death sentences. The safeguards that the [U.S. Supreme Court] relied on to avoid discriminatory and freakish application of the penalty have not performed that function."[10]

Other researchers have focused squarely on the question of whether there are racial disparities in the imposition of Georgia death sentences. The first of these studies was published by William Bowers and Glenn Pierce in 1980, and included results from their study of death sentencing patterns in Georgia, Florida, Texas, and Ohio.[11] In Georgia, they studied 3,793 homicides and 99 death sentences, 1972-1977. They found that 16.7 percent of the blacks who were suspected of killing whites were sentenced to

---

6 *Id.* at 115-18.
7 George E. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979).
8 *Id.* at 123.
9 Ursula Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U. L.Q. 573 (1985).
10 *Id.* at 638.
11 William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post*-Furman *Capital Statutes,* 26 CRIME & DELINQ. 563 (1980).

death, followed by 4.2 percent of the whites suspected of killing whites and .5 percent of the blacks suspected of killing blacks.[12] These racial disparities remained even after restricting the analysis to homicides with accompanying felonies, the type of homicide most likely to lead to a death sentence.[13]

Samuel Gross and Robert Mauro examined data on 2,126 Georgia homicides (and additional homicides in seven other states) that occurred between January 1, 1976 and December 31, 1980.[14] While overall 3.7 percent of the homicide suspects were sent to death row, the researchers found that 8.7 percent of those suspected of killing whites were sentenced to death, compared to .9 percent of those suspected of killing blacks.[15] Blacks suspected of killing whites were the most likely to be sentenced to death (20.1 percent), followed by whites who were suspected of killing whites (5.7 percent) and blacks suspected of killing blacks (.8).[16] Gross and Mauro tried to explain these disparities by focusing only on homicides accompanied by other felonies, and then only on homicides between strangers, and then only on multiple homicides, but the racial disparities remained persistent and strong. After variables measuring race of defendant and race of victim were entered into a multivariate model with measures of several aggravating factors, the researchers concluded that "the odds of receiving the death

---

[12] *Id*. at 594.
[13] *Id*. at 599.
[14] SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); *see also* Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).
[15] *Id.* at 44.
[16] *Id.* at 45. Because there were only 34 cases where whites were suspected of killing blacks, the analysis does not focus on this category.

penalty for killing a white are approximately 7.2 times greater than the odds of receiving the death penalty for killing a black."[17]

By any measure, the most comprehensive research ever produced on sentencing disparities in American criminal courts is the work of David Baldus and his colleagues conducted in Georgia in the 1970s and 1980s.[18] As four Supreme Court justices later wrote, the study "is far and away the most refined data ever assembled on any system of punishment, data not readily replicated through casual effort. Moreover, that evidence depicts not merely arguable tendencies, but striking correlations, all the more powerful because nonracial explanations have been eliminated."[19]

Baldus's work in Georgia actually was contained in two studies: the Procedural Reform Study (PRS) and the Charging and Sentencing Study (CSS). The former compares 156 pre-*Furman* and 594 post-*Furman* cases (1973-78) in which a jury convicted a defendant of murder. The latter study examined a universe of 2,484 defendants (with a sample of just over 1,000) charged with homicide and who were convicted of either murder or voluntary manslaughter, 1973-79.

The study was able to evaluate a wide array of variables -- more than 400 -- in their ability to predict who is sentenced to death. The most important logistic regression model used to summarize the data used 39 predictor variables. The model revealed that

---

[17] *Id.* at 66.

[18] DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990). Portions of the work by Baldus and his colleagues with Georgia data can also be found in David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986), David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 JOURNAL OF CRIM. L. & CRIMINOLOGY 661 (1983), and David C. Baldus et al., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985).

[19] McCleskey v. Kemp, 481 U.S. 279, 342 (1987).

for similar homicides, the odds of a death sentence for those convicted of killing whites in Georgia were 4.3 times higher than the odds of a death sentence for those convicted of killing blacks.[20]

The Baldus study measured and controlled for dozens of legally-relevant factors that might (in theory) have an impact on death sentencing decisions. However, the final model that statistically controlled for all these factors was unable to eliminate the strong power of the victim's race in explaining who was sentenced to death.

Replicating this study today would undoubtedly cost tens of millions of dollars. However, the question remains whether race continues to correlate with Georgia death sentencing with more contemporary data. If so, we know from the Baldus study that conducting a much larger study and controlling for the effects of additional variables would be unlikely to change the overall conclusions. We now turn to the methodology we employed to ascertain if race effects are still evident in selecting who goes to death row in Georgia.

---

[20] Attorneys representing Georgia death row inmate Warren McCleskey took these data to the Supreme Court in 1987, claiming unfair racial bias in the administration of the death penalty in Georgia. But the Court rejected the argument, as well as the idea that a statistical pattern of bias could prove any bias in McCleskey's individual case. *McCleskey*, 481 U.S. at 279. The vote in *McCleskey* was 5 to 4. *Id.* Interestingly, the decision was written and the deciding vote cast by Justice Lewis Powell, who was then serving his last year on the Court. Four years later, Powell's biographer asked the retired justice if he wished he could change his vote in any single case. Powell replied, "Yes, *McCleskey v. Kemp*." Powell, who voted in dissent in *Furman* and in his years on the Court remained among the justices who regularly voted to sustain death sentences, had changed his mind. "I have come to think that capital punishment should be abolished ... [because] it serves no useful purpose." JOHN CALVIN JEFFRIES, JR. JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451-52 (1994). Had Powell come to this realization a few years earlier, it is quite likely that, as in 1972, the death penalty would have been abolished, at least temporarily.

Methodology

To study the possible relationships between the races of homicide defendants and victims and death penalty decisions, researchers must begin by comparing two groups of defendants and victims: those involved in death penalty cases and those involved in homicides that do not result in a death sentence. Should rates of death sentencing vary between races of defendants and victims (e.g., if higher rates of death sentencing are found among those who kill whites than those who kill blacks), researchers must then examine legally relevant factors to ascertain if these factors account for the different rates.

To compare defendants sentenced to death with all homicide suspects, we first need to select a time period for study. Studying individual years is problematic because the year under study may be idiosyncratic, and one year's worth of homicide data may not provide enough information to allow the identification of long-term patterns. Thus, in this study, to obtain a representative picture of death sentence decisions we examined death sentencing over a ten-year period. In order to study contemporary death penalty decision-making we wanted to use recent cases, but not so recent that a substantial number of homicides from the period would not have yet reached final adjudication. To meet these two considerations, we selected for study all homicides from Georgia that occurred on or after January 1, 1989 and on or before December 31, 1998.

To make comparisons between all homicide suspects and defendants sentenced to death, information was collected on 1) all homicides committed in Georgia over the ten-year study period, and 2) the subset of all those cases which ended with a defendant being sentenced to death. This information was collected from two data sources.

Supplemental Homicide Reports (SHRs): The Supplemental Homicide Reports are the FBI's national data collection system for homicide incidents reported to law enforcement agencies. SHR reports on homicides are collected by local police agencies throughout the United States. These agencies report the SHR data to the FBI, either directly or through their state's crime reporting program. Information on each homicide collected through the SHR reporting system is included in the FBI's Uniform Crime Reports.[21] While the SHR reports do not record the suspects' or victims' names, they do include the following information: the month, year, and county in which the homicide occurred, the age, gender, race, and ethnicity of the suspects and victims, the victim-suspect relationship, the weapon used, and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).[22] Since local law enforcement agencies usually report these data long before the suspect has been convicted (or sometimes even before the suspect has been arrested), these data are for homicide "suspects," not arrested defendants or convicted offenders.[23]

2. Death Sentence Data Set: Information on all cases that ended in a death sentence for murders committed in Georgia during the study period was obtained by the Georgia Death Penalty Assessment Team ("the team"). The team obtained the majority of this information from Georgia "trial judge reports." Georgia law requires trial judges to complete trial judge reports in cases in which a sentence of death is imposed.[24] The

---

[21] *See* National Archive of Criminal Justice Data, Learn More About the Supplementary Homicide Reports, http://www.icpsr.umich.edu/NACJD/SDA/shr7699d.html (last visited on Jan. 4, 2006).
[22] *Id.*
[23] *Id.*
[24] *See* O.C.G.A. § 17-10-35(a) (2004); Green v. State, 242 S.E.2d 587 (Ga. 1978) (placing duty upon trial judge, not defendant, in death penalty case to prepare trial report).

trial judge report, which is a multi-page questionnaire, requires judges to provide information on a number of issues, including the race of the defendant and victim, the aggravating and mitigating circumstances, and the date of the offense.[25] In cases in which the trial judge report was unascertainable or missing pertinent information, the team reviewed Georgia Supreme Court decisions and contacted the defense attorneys to obtain the necessary information. Once the team gathered all of this information, it was sent to Professor Paternoster who, with the assistance of two graduate students, entered the data into a SPSS file, checked it for accuracy from the SPSS file back to the original data sources, and corrected any inaccuracies.

In addition to information on the races of suspects/defendants and victims, both data sets collected data on legally relevant factors that may be important factors in death penalty decisions. For this analysis, we examined two legally relevant factors that are potentially related to the decision of who is sentenced to death: 1) whether the homicide took the life of more than one victim, and 2) whether the homicide involved accompanying felonies, such as a rape or a robbery. With these data, we were able to classify each homicide in both the SHR and the Death Sentence Data Set as involving zero, one, or two potentially aggravating circumstances.

---

[25] The trial judge report specifically asks for the race of the defendant, but asks only whether the race of the victim is the same as the race of the defendant. *See* Supreme Court of Georgia, Unified Appeal Report of the Trial Judge, *at* http://www2.state.ga.us/Courts/Supreme/rules_UAP/uasect6.htm (last visited on Jan. 4, 2006). In six of the thirteen cases where the race of the victim was different from that of the defendant, we obtained the race of the victim by contacting defendants' defense attorneys. For the other cases where the race of the victim was not the same as the race of the defendant, it was assumed that white defendants had black victims and black defendants had white victims.

Results

To examine the potential effects of the suspect's and victim's races and the two measured aggravating circumstances on death penalty decisions in Georgia, we first merged the two data sets: the Death Sentence Data Set and the data on homicide suspects from the SHR data set. Cases were matched based on the victim's race and defendant/suspect's race and the known aggravating circumstances. Homicide incidents involving victims or defendants/suspects who were neither white nor black were excluded from the analysis because their low frequency among Georgia homicide cases prohibits statistical analysis. Of the 59 cases in the Death Sentence Data Set, there were three cases missing information on the race of the defendant, and four cases missing information on the victim's race.[26] Thus, our analysis involving victim's race uses 55 death penalty cases (Tables 1 and 2); for defendant's race we use 56 cases (Table 3), and we use 55 cases where we examine both defendant's and victim's races (Table 4). Other researchers have used similar matching methods.[27]

Table 1 presents data on 55 cases that resulted in the death penalty in which the races of both the defendant and victim were either black or white. We categorize the death penalty cases according to whether the homicide victim was black or white, and compare these tallies to the racial distribution of all Georgia homicides collected through the SHR reporting system. Table 1 shows that the death penalty in Georgia is imposed in

---

[26] Thus for death sentences we have; 56 cases where the offender was either white or black, 55 cases where the victim was either white or black, and 55 cases when we examine the race of offenders and victims in combination with race being restricted to with white or black.

[27] *See, e.g.*, GROSS & MAURO, *supra* note 14, at 38-39.

only a small minority of homicide cases: only 1.037 percent of homicides with a suspected perpetrator during the study period ended with a death sentence. However, 2.245 percent of those who were suspected of killing whites were sentenced to death (37 ÷ 1,648), compared to .492 percent of those who were suspected of killing blacks (18 ÷ 3,658). Comparing these death-sentencing rates (2.245 ÷ .492), the data show that among all homicides with known suspects, those suspected of killing whites are 4.56 times as likely to be sentenced to death as those who are suspected of killing blacks. This difference, as measured by the Chi-Square test, is statistically significant.[28]

It is possible that the higher proportion of death sentences for those suspected of killing whites versus those suspected of killing blacks is because white victim homicides are typically more aggravated than black victim homicides. Under these circumstances, a higher level of aggravation among white victim homicides would explain the higher death-sentencing rate. To test for this possibility we developed an index of aggravating circumstances composed of two of the most common aggravating factors in criminal homicide cases: accompanying felonies committed in conjunction with the homicide and multiple victims. The index enables us to categorize homicides by level of aggravation: 1) neither of the two measured aggravating circumstances are present, 2) one aggravating circumstance is present, and 3) both aggravating circumstances are present. We were able to classify the cases by level of aggravation in both the SHR and the Death Sentence

---

[28] The Chi-Square test is one of the most commonly used statistical measures of significance. It is a test of statistical significance for the difference between the observed frequencies and the expected frequencies under the null hypothesis, which in this case involves the relationship between death sentence decisions and our independent variables, such as race of the victim. *See, e.g.*, ALAN AGRESTI & BARBARA FINLEY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 248-72 (3d ed. 1997). We also report in Tables 1-4 a more conservative Chi-Square measure called "Yates' continuity correction." This statistic is basically a minor adjustment of the traditional Chi-Square test, leading to more accurate estimates in distributions with small samples.

Data Sets. This procedure allows us to test whether the race of the victim remains significantly related to death sentencing rates while controlling for varying levels of aggravating circumstances present in the homicide cases.

Table 2 examines the relationship between death sentencing and victim's race controlling for level of aggravating circumstances. This Table divides homicides into the three categories of aggravating circumstances; those with zero, one, or two of the measured aggravating circumstances present. Examining the three "totals" rows in Table 2 shows that level of aggravation is indeed correlated with death sentencing rates: only .23 percent of the cases with neither of the aggravating circumstances we measured resulted in a death sentence (9 ÷ 3,962), compared to 3.02 percent of the cases with one aggravator and 13.21 percent of the cases with both aggravators. This shows that the death sentencing system in Georgia is far from totally arbitrary; it is rational insofar as it does respond to different levels of aggravation. It is the more aggravated cases where death sentences are most likely to be imposed.[29]

Nonetheless, the data presented in Table 2 show that the level of aggravation does not explain the overall race of victim effect, as the victim's race is still correlated with death sentencing rates within each level of aggravation. Among cases with neither of the measured aggravating circumstances present, .61 percent of those suspected of killing whites are sentenced to death and .07 percent of those suspected of killing blacks, a ratio

---

[29] For example, Bowers and Pierce, *supra* note 11, at 598-99, found that Georgia homicides that included felony circumstances were more likely to result in a death sentence than other homicides. Gross and Mauro, *supra* note 14, at 59, found that death sentencing rates increased from 0.4 percent of all homicides with no measured aggravators to 57.1 percent of the cases which contained the three aggravators they measured. Similarly, BALDUS ET AL., *supra* note 18, at 90, report a "strong association between the number of aggravating circumstances and the probability of receiving a death sentence."

of 8.66. Thus, among suspects with neither measured aggravating circumstance present, those with white victims are 8.66 times more likely to be sentenced to death than those with black victims. Using a Chi-Square test, we see that these differences are statistically significant at the .01 level.

This disparity diminishes among cases where there is one aggravating circumstance present. Here we find that those who are suspected of killing whites are 3.33 times more likely to be sentenced to death than those who are suspected of killing blacks. The Chi-Square test tells us that the probability that these patterns could result by chance is less than 1/1000. Finally, among cases with two aggravating circumstances present, those who are suspected of killing whites are 1.61 times more likely than those suspected of killing blacks to be sentenced to death. While this is still a strong difference, because there are only 53 cases with two aggravating circumstances present and it is difficult to generalize from such a small number of cases, the Chi-Square test is not significant.[30] That the race effects diminish at higher levels aggravation is a pattern also found by previous researchers, and also is evidence of some rationality in the system.[31]

Table 3 presents data on the relationship between death sentencing and the race of the suspect. The data show that given a homicide, white suspects are 3.92 times more likely than black suspects to be sentenced to death, which is a bit smaller than the race of

---

[30] Equally important, when we breakdown the 53 cases with two aggravating circumstances by race of victim, we find fewer than five cases in two of the four cells (i.e., there were four offenders convicted of killing whites and three convicted of killing blacks). The Chi-square test is not a reliable test of statistical significance when expected cell frequencies include five or fewer cases.

[31] BALDUS ET AL., *supra* note 18, at 153-54, report that the largest race-of-victim effects in their Georgia data are found among cases with mid-levels of aggravation.

victim differences observed in Table 1. Overall, 2.34 percent of the white suspects were sentenced to death, compared to only .597 percent of the black suspects. These differences are statistically significant at the .001 level. However, this pattern may arise because intra-racial homicides are far more common than inter-racial homicides -- whites tend to kill white victims and blacks tend to kill other blacks, and the data in Table 1 has already told us that suspected killers of whites are more likely to be sentenced to death than those who are suspected of killing blacks. As a result, white homicide offenders may receive death sentences at the higher rate because of who they are more likely to kill (i.e., other whites). To address this question, in the next Table we examine death sentence rates by race of the suspect while controlling for race of victim.

Table 4 displays death-sentencing rates by race of victim, broken into the two categories of suspect's race. Table 4 shows that among white victim homicides, the race of the suspect has no statistically significant association with death sentencing decisions. That is, whites who are suspected of killing whites have rates of death sentencing that are similar to blacks who are suspected of killing whites. Similarly, among cases where blacks are killed, 1.9 percent of white suspects are sentenced to death, compared to only .45 percent of the black suspects. However, while the difference between the two rates may at first appear large, the Chi-Square statistics tells us that there is no statistically significant difference in death sentencing rates among those who are suspected of killing blacks between white and black defendants.[32] Although this difference appears to be important, it is not statistically significant; there are only two cases where whites were

---

[32] Indeed, the difference in rates is largely dependent on two cases of involving a white offender and black victim, which is too few cases to actually calculate a chi-square test.

sentenced to death for killing blacks, which is too few to use the Chi-Square test and draw generalizations. This frequency is too low for the Chi-Square test to be used as a test for statistical significance.[33] Overall, the data in Table 4 show that among the four categories of suspect/victim race, the lowest rate of death sentencing is found among cases with black suspects and black victims. This finding raises the question of whether the comparatively low death sentencing rate among black-on-black cases is an artifact of low levels of aggravation in such cases.

To examine the combined effects of victim's race, suspect's race, and aggravating circumstances on death penalty decisions in Georgia, a multivariate statistical technique was used. For the analysis of dichotomous dependent variables (such as death sentence vs. no death sentence), the appropriate statistical technique is logistic regression analysis.[34] Table 5 presents the results of the logistic regression analysis. The independent variables are all entered into the analysis as dichotomous measures. Thus, where there was one aggravating circumstance or two aggravating circumstances, such data were entered as dichotomous variables. Cases with neither aggravating

---

[33] *Id.*

[34] As we have explained elsewhere, "Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is /75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case is 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, y=P / 1-P and (1) ln(y) = âo + Xâ + ξi where âo is an intercept, âi are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ξi is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, and odds ratio of 1 means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor." Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 OR. L. REV. 39, 59 (2002).

circumstance present were left out of the equation so they could be used as the reference or comparison category. Similarly, variables measuring the racial combinations of victims and suspects were entered into the analysis as dichotomous variables: one for white suspects and white victims, a second for white suspects and black victims, and a third for black suspects and white victims. Cases with black suspects and black victims were left out of the equation so they could be used as the reference or comparison category.

To examine the estimated effect of a single independent variable, controlling for the effects of all other variables, we use the exponentiated value of the Beta (ß) coefficient, which is the logistic regression beta coefficient, Exp(ß). Only three of the five independent variables show statistically significant effects on death penalty decisions in Georgia: cases with one aggravating circumstance, cases with two aggravating circumstances, and cases where whites are suspected of killing other whites. The Exp(ß) coefficients in Table 5 shows that the odds of receiving a death sentence for homicide cases with one aggravating circumstance increase by a factor of 15.826 controlling for the other independent variables, and that the odds of receiving a death sentence for homicide cases with two aggravating circumstances increase by a factor of 59.711, again controlling on the other independent variables. In addition, Table 5 shows that the odds of receiving a death sentence for homicide cases where the suspect is white and the victim is white increase by a factor of 6.097 (relative to the reference group of black suspect/black victim homicides), controlling on the other independent variables. The other two combination of victims' and suspects' race (i.e., black on white homicides and white on black homicides) are not statistically significant predictors of death sentence

decisions in Georgia. Overall, the logistic analysis shows that homicide cases with higher levels of aggravating circumstances are statistically more likely to receive the death sentence in Georgia, and that white-on-white homicides are more likely than black-on-black homicides to result in a death sentence, even after the level of homicide aggravation is statistically controlled.

Conclusion

This study focused on death sentences in Georgia that were imposed for homicides committed over a ten-year period: January 1989 through December 1998. Since previous studies by David Baldus and his colleagues focused on homicides through 1979, and Gross and Mauro studied death sentencing through 1980, the data presented herein significantly update our previous understandings about death sentencing in Georgia.

Our data indicate that there is at least some rationality or consistency in Georgia death sentencing. Table 2 shows that death sentences are more likely to be imposed in the more aggravated homicide cases, and racial disparities in death sentencing are lower among the more highly aggravated cases.

Nonetheless, we also find that both the race of the defendant and the race of the victim predict who is sentenced to death, with white suspects and those who kill white victims being more likely to be sentenced to death than black suspects and those who kill black victims. The data in Table 4, however, shows that only 525/5,257 homicides in the study (9.9 percent) are inter-racial. This makes it impossible to examine the effect of defendant's race without also considering victim's race. Table 5 shows that rather than

talking about the race of defendant or race of victim effects alone, we need to speak of their combined effects. When we do so, we find that our two measures of aggravation continue to predict who is sentenced to death. In addition, and controlling for the two measures of aggravation, we find that white suspects with white victims are significantly more likely than black suspects with black victims to be sentenced to death. In short, the widespread disparities documented by researchers with data from the 1970s have continued in the 1990s.

These relatively recent findings from Georgia are quite consistent with many other post-*Furman* studies that have found persistent race-of-victim disparities in death sentencing. Those studies conducted prior to 1990 were reviewed by the General Accounting Agency; their report concluded that in 82 percent of the studies "race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."[35] Since then, studies in Florida,[36] Illinois,[37] Maryland,[38] and California,[39] among others,[40] have also found that those who are suspected of killing whites are much more likely to be sentenced to death than those suspected of killing non-whites. Clearly, the Georgia data echo what has been found elsewhere: in contemporary death sentencing decisions in the United States, race matters.

---

[35] *See* U.S. GEN. ACCT. OFFICE, *supra* note 2, at 5.

[36] Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991).

[37] Pierce & Radelet, *supra* note 34.

[38] Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 MARGINS 1 (2004).

[39] Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005).

[40] For a review, see David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Research with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194 (2003).

Table 1

Death Sentence Rates for Suspects by Victim Race, 1989-1998

Victim's Race Victim	SHR Suspects	Death Sentenced Defendants	Death Sent. Rate Per 100 Suspects	Ratio of White Rate to Black Rate
White	1,648	37	2.245	
Black	3,658	18	0.492	4.56
Total	5,306	55	1.037	

Chi-Square equals 34.04, 1 degree of freedom, $p \leq .001$.
Yates' continuity correction equals 32.350; $p \leq .001$.

Table 2
Death Sentence Rates by Victim Race Controlling for Aggravating Circumstances

a. Neither Aggravating Circumstance

Victim's Race	SHR Suspects	Death Sentenced Defendants	Death Sent. Rate Per 100 Suspects	Ratio of White Victim Rate to Black Victim Rate
White	1,140	7	0.6140	
Black	2,822	2	0.0709	8.66
Total	3,962	9	0.2272	

Chi-Square equals 10.570; 1 degree of freedom, $p = .001$.
Yates' continuity correction equals 8.309; $p = .004$.

b. One Aggravating Circumstance

Victim's Race	SHR Suspects	Death Sentenced Defendants	Death Sent. Rate Per 100 Suspects	Ratio of White Victim Rate to Black Victim Rate
White	484	26	5.3719	
Black	807	13	1.6109	3.33
Total	1,291	39	3.0209	

Chi-Square equals 14.608; 1 degree of freedom, $p \leq .001$.
Yates' continuity correction equals 13.352; $p \leq .001$.

c. Two Aggravating Circumstances

Victim's Race	SHR Suspects	Death Sentenced Defendants	Death Sent. Rate Per 100 Suspects	Ratio of White Victim Rate to Black Victim Rate
White	24	4	12.500	
Black	29	3	6.8966	1.61
Total	53	7	13.207	

Chi-Square equals .458; 1 degree of freedom, not significant.
Yates' continuity correction equals .072; not significant.

Table 3
Death Sentence Rates by Race of Suspect

Suspect's Race Victim Victim	SHR Suspects	Death Sentenced Defendants	Death Sent. Rate Per 100 Suspects	Ratio of White Rate to Black Rate
White	1,324	31	2.341	
Black	4,023	24	0.597	3.92
Total	5,347	56	1.047	

Chi-Square equals 29.790, 1 degree of freedom, $p \leq .001$.
Yates' continuity correction equals 28.100; $p \leq .001$.

Table 4
Death Sentence Rates by Victim's and Suspect's Race

Races Defendant Victim/Suspect Race Defendant	SHR Suspects	Death Sentenced Defendants	Death Sent. Rate Per 100 Suspects	Ratio of White Rate to Black Rate
White - White	1,183	29	2.393	
White - Black	421	8	1.865	1.28
Subtotal White Victim	1,641	37	2.255	

Chi-Square equals .401, 1 degree of freedom, not significant.
Yates' continuity correction equals .197; not significant

Black - White	104	2	1.923	
Black - Black	3,549	16	0.451	4.26
Subtotal Black Victim	3,653	18	0.493	

Chi-Square equals 4.467, 1 degree of freedom, not significant
Yates' continuity correction equals 1.969; not significant

Table 5
Logistic Regression Analysis of
Race of Victim, and Race of Suspect and Aggravating Circumstances on the Imposition of a Death Sentence*

Independent Variables**	ß	Sig.	Exp(ß)
One aggravating circumstances	2.762	.000	15.826
Two aggravating circumstances	4.090	.000	59.711
Black Suspect/White Victim	.580	.190	1.786
White Suspect/Black Victim	1.303	.091	3.680
White Suspect/White Victim	1.808	.000	6.097
Constant	-.6.933	.001	.001

Number of cases = 5,294
-2 Log likelihood = 489.772
* Death Sentence is coded as 0 = no death sentence, 1 = death sentence.